No. 165

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The Supreme Court of the United States.

No. 482.

On appeal from the Equity side of the Circuit Court of the United States, for the Western District of Tennessee.

CALVIN AMORY STEVENS,
who sues for himself and others,
vs.
THE MOBILE & OHIO RAILROAD CO. ET ALS.

BRIEF FOR THE APPELLEES.

P. HAMILTON,
of Counsel for Appellees.

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BRIEF FOR THE APPELLEE.

I. STATEMENT OF THE FACTS IN THE CASE.

On the 11th February, 1852, the General Assembly of Tennessee passed an Act entitled "An Act to establish a system of Internal Improvements in this State."

This act, in its inception, was a bill to aid a single Railroad Company, to-wit: The East Tennessee and Virginia Railroad Company. The first nine sections speak of no other corporation, and do not use any language to include any other. The tenth section declares the provisions of the act shall extend to thirteen other corporations therein named; and the remaining eleven sections use words of extension suitable to the intention declared in the tenth section.

This act thus fell into the train of laws which had, before that time, been passed by the State, in aid of its public improvement system. It was also followed by other acts upon the same subject, and amendatory in particulars of former laws; the whole forming an extensive system of statute law in *pari materia*, upon that subject.

The act of 11th February, 1852, is the principal act to be considered in this cause, but in connection with the amendatory acts.

Under this legislation the Mobile and Ohio Railroad Company received from the State twelve hundred and ninety-six bonds of $1,000 each, with interest coupons payable semi-annually, at six per cent.—all made in the name of the State of Tennessee in the form directed by said act of 1852—that is to say: in 1856 that corporation received, at sundry times, 430 bonds which mature 1st of January, 1892: in 1857, 388 bonds, maturing at the same time; in 1850, 100 bonds, maturing 1st of January, 1898; in 1860, 250 bonds, maturing at the time last named, and in 1861, 172 bonds, maturing at the same time.

These 1296 bonds said Mobile and Ohio Railroad Company afterwards sold to sundry parties. In making the sale of these bonds, the Railroad Company in no way became any party to them, by endorsement, guarantee or otherwise, or assumed to the transferee or holder any liability, beyond what the fact of transfer imports. Its name no where appears on said bonds, or in any contract relating to them.

In 1871, the Railroad Company executed a large number of its own bonds, and authorized Wm. B. Duncan, A. Iselin and R. T. Wilson to negotiate and sell these last named bonds, and with the proceeds, to purchase an amount of Tennessee State

bonds and coupons equal to the principal, with interest then matured, upon the bonds that said Railroad Company had received from the State of Tennessee, under said act of 11th February, 1852; and to deliver these purchased securities to the State of Tennessee, in payment and discharge of the debt the Company had contracted to said State, by the loan of the said 1296 bonds in the years 1856, 1857, 1859 and 1860, and of the lien the State had obtained therefor.

The Railroad Company declared the said Duncan, Iselin and Wilson in this transaction, to be trustees for the holders of the bonds it had so issued, of all liens and securities which the State of Tennessee was entitled to upon its property, and had theretofore held—and they were authorized to receive to themselves, but in trust for others, from said State a transfer or assignment of said liens and securities; and thereafter, to hold the same in trust for the security and payment of the bonds of the Railroad Company negotiated by them, and whose proceeds had purchased the State bonds so delivered by said trustees to the State.

In 1872, the arrangement so undertaken with the State was completed. Bonds and coupons to the full amount of the debt the Company had contracted to the State by borrowing its bonds, principal and interest were delivered to the State of Tennessee by the said Duncan, Iselin and Wilson. This was done with the consent of the Railroad Company. With its like consent, said Duncan, Iselin and Wilson, as trustees for the holders of the bonds of the Railroad Company which they had negotiated, received from the State an assignment of its liens or statute mortgage upon the property of the Railroad Company; and also received the certificate of the State, under the authority of its law, upon each of the bonds which the Railroad Company had

thus issued, that it was a first mortgage bond of the Company so issuing.

Since that time, said Duncan, Iselin and Wilson have notoriously claimed the lien and mortgage so transferred to them, as trustees for the holders of these new Railroad bonds, and have publicly, by bills in this Court, and otherwise asserted and maintained that right so derived.

The bill in this cause is now filed in behalf of the holders of some of the State bonds above described, which had been issued by the State under the act of 1852, which were negotiated and sold by this Railroad Company; and asserts that the holders of those State bonds can coerce their payment from this Railroad Company, by foreclosure and sale of its property under the lien reserved in the act of 1852, which authorized the dealings between the State and the Railroad Company, resulting in the loan of its bonds by the State.

II. Remarks upon above Statement of Facts.

The above is a simple statement of the facts, without comment upon the statutory provisions relating to the subject.

It is plain upon these facts, that the dealing by the Railroad Company with these State bonds; their negotiation, sale and delivery, by the Company, created no liability upon the Company to pay them, or in any manner provide for their payment, no question being made upon their genuineness.

Curran vs. Arkansas, 15 How. R., 304, 317.

Otis vs. Cullom, 92 U. S. R., 447.

Orleans vs. Platt, (U. S. Su. Ct.) 99 U. S. R., 676, 679.

The case upon these facts then in effect, is this. The Railroad Company was not indebted upon the bonds, either to the

State which loaned them, or to the holder, who purchased them. It was, however, indebted to the State for the *loan of its bonds.*

The relation of creditor and debtor thus existing, (but not on any bond or written obligation held by the State, which it could in specie surrender or transfer,) the Railroad Company executed its obligations in writing, payable at a future time, under its seal, for the amount due and to become due, upon the loan it had obtained from the State. The State certified these obligations to be properly made, and virtually transferred them to third parties, in consideration of the receipt by her from them, of an equivalent amount of her own obligations; and with the assent of the Railroad Company, also transferred to said third parties, as trustees for the security of the new bonds the lien and security she held upon the property of the Company for repayment to her of the loan she had made to the Company, in her bonds.

This is the plain result of the dealings between the parties. It is as plain there was nothing to prevent the State and Railroad Company from changing the form of the evidence of the debt contracted by the latter, or substituting one form of security for another. A debt created on open account, is not impaired by the debtor furnishing in writing, a specific promise for its payment. The debt remaining the same, even though changed in form, the security for the payment is not impaired, even as to subsequent lien-holders: and no such thing was here intended. 2 Jones on Mortg., § 924 *et seq.*

Upon the relation of the parties, as growing out of the loan of the bonds, and their use by the borrower, and the form of the bonds which the creditor loaned to its debtor, it seems very clear that the holders of these bonds have no standing to assert any claim against the Railroad Company or against its property.

III. Statement of the Statutes of 1869–'70.

Let us now consider the statutes which have reference to these transactions, and see wherein they change the results which would flow from the simple facts of the case.

First, as to the statutes under which Duncan, Iselin and Wilson made the arrangement with the State in 1872. There are two statutes, to-wit: "*An Act to liquidate the State debt contracted in aid of Railroad Companies in the State of Tennessee*," approved February 25th, 1869, and "*An Act for the payment of the State debt*," approved January 2d, 1870.

By these, it is recited, that aid had been granted by the State to sundry Railroad Companies by *the loan* of its bonds, which is secured by a first mortgage lien upon the property of said loanees, and it is desirable the State shall be reimbursed its advances as fast as practicable. It is then enacted that Railroad Companies so indebted, may pay to the State the principal of their debt, in the bonds of the State, (that is, in any bonds,) but the State's lien for unpaid interest shall remain undisturbed; that Companies so paying, may issue bonds for an amount equal to the bonds so delivered to the State, and that these corporation bonds on being certified and recorded, shall be a lien of equal validity and effect upon the property of the Company issuing them, with the debt still remaining unpaid to the State. To aid the desired settlements, Railroad Companies were authorized to consolidate their roads. Upon return by any Railroad Company of any State bonds, the Comptroller was to receipt for them, and to certify upon the new bonds which the paying Railroad Company might issue, that the lien of the State was discharged *pro tanto*, and that such new bonds were secured by a first mortgage. Measures were provided to prevent the issue

of new Railroad bonds, except in exact correspondence with the amount of State bonds, which such Company had caused to be retired by surrender to the State.

It was enacted that if any person or corporation should, with the consent of the indebted Railroad Company, pay its debt in bonds of the State, the party so paying should *be substituted and entitled to all the liens* that the State could or did have against that Company for its debt; that any person, with the consent of the debtor Railroad Company, might pay its debt to the State in State bonds or coupons, at par, and the person so paying with such consent of the debtor Railroad Company, upon filing with the Treasurer proof of such consent, should be entitled *to have and to hold all the lien or liens the State had* upon the property of such debtor Railroad Company, with the same right to enforce the same; and the declaration was made, that it was the object and intent of the State, to place the party so with the consent of said Railroad Company, discharging its debt to the State, in the same position and with the same rights which the State had before, for its security, and with full power to enforce the same; that any person with the consent of a debtor Railroad Company discharging any portion of its indebtedness to the State, should *have, hold, and be subrogated pro tanto,* to the rights, privileges and securities the State theretofore held for the security of the debt created by its loan of State bonds.

The later act of 1870, specifically declared that the payment in bonds provided for by the act of 1869, might be made in *any of* the legally issued six per cent. bonds of the State, without regard to series or number. The new bonds authorized to be issued by the Railroad Company were not to be restricted to interest at six per cent., and unpaid interest due the State, might

be discharged in unpaid State coupons. If any bonds were paid in, which had been loaned to the paying Company, they were to be cancelled: but if the bonds so paid in, had been loaned to other Railroad Companies, they were to be held as *purchased* bonds, and the State was to retain its lien upon the property of the Railroad to which they had been loaned, till its debt were fully paid.

Such settlements, it was declared, should be at the par of the State bonds that might be delivered to the Treasury; and as to the State, should be a payment: but *the passage of the act* should not decrease the lien of the State upon any railroad, till the entire claim of the State thereon were liquidated, nor disturb the interest of the holders of State bonds; and such settlements were not to be made in cases where the State was only *secondarily* liable.

IV. Remarks upon the Statutes of 1869–'70.

These statutes proceed upon the theory that the State was the creditor of the several Railroad Companies which had borrowed its bonds, to the amount of the principal of the borrowed bonds, and unpaid matured interest thereon. As between the State and these loanees, these bonds were money; and the receipt of them by the Railroad Companies had created a moneyed liability from them respectively to her, reimbursement of which the State was entitled to demand.

Also, that the State in her own right held a lien or mortgage incumbrance, upon the property of the Railroad Companies so indebted, for the payment to her of this debt; and as such holder and absolute owner, had the right to deal with her debtors, use the securities and liens she thus held, in such manner as she saw fit, or could agree upon with her debtors.

It also appears, in this legislation, that the State recognized herself as a debtor upon these bonds, as also upon other bonds, and was desirous to retire her said indebtedness. She sought to do so, to the extent of the debt owed to her by the Railroad Companies, by getting in her own bonds, through the substitution therefor, of the direct bonds of the Railroad Companies. She proposed to reach this end by the Railroad Companies executing their own bonds for the amount of their indebtedness to the State, to be secured by the liens the State held for the debt incurred by the loan of her bonds; and by exchange of these Railroad bonds with the holders of State bonds, or by applying the proceeds of their sale, obtain original bonds of the State. These State obligations being returned to the State, would be the consideration for the transfer and assignment by the State to the holders of the new Railroad bonds, or for their use and benefit, of the lien originally retained by her upon their property for the loan of State bonds.

The State was careful in this legislation to provide that the debtors assent should be obtained to any transfer of her liens; but with that assent, the transaction might be had with any party so accredited. The State so proposing to act, was careful also, to delare that the passage of the act should not at all impair the claim against her of the holders of her bonds; nor should the arrangement, when completed, operate a payment except as to the State; and wherever the State was the grantor or endorser, (that is, secondarily liable) upon bonds, such kind of claim by the State upon a Railroad Company, should not be settled by the return of bonds other than those guaranteed or endorsed by her. In other words, the State did not, by this legislation, undertake to deal with, but excluded from it, that

class of cases, where the holders of her liabilities had at the same time demands upon others as principal debtors.

From a compaison of the facts with the provisions of these statutes, it is apparent the transaction between the State and Duncan, Iselin and Wilson in 1872, strictly conformed to the law. There is perfect harmony between the two.

It is also apparent, that upon the theory of these statutes, that transaction was legal and valid upon principles of law and justice, entirely apart from the statute. The transaction between the State of Tennessee, the creditor, and the Mobile and Ohio Railroad Company, its debtor, through the agency of Duncan, Iselin and Wilson, whom the Railroad Company had authorized to act in its behalf, and the same gentlemen, as trustees for the holders of the new Railroad bonds, was entirely competent to be made between them. The only need of the statute being as authority or letter of attorney to the officers of the State, its agents to make the transaction. The right of the State over the subject grew out of the fact that it was the creditor of its loanees, the Railroad companies, for value advanced to them, holding securities for the payment of its debt; its right originated with the loan of its bonds, under the conditions of the act of 1852. The statute did not give the State its right, it simply authorized its agents to deal with them as the State directed.

It is submitted there is nothing in this legislation which gives countenance to the right asserted in their bill by these complainants.

This legislation, however, does give proof of the *practical construction* of her rights which the State of Tennessee publicly announced, and upon which she authorized her agents to act, and upon which they did act, and upon which the other parties

also acted, and assumed large liabilities, and expended large smus of money. It is, in fact, but an expansion of the scheme of payment propounded by the State in section 7 of the act of 1852, by the machinery of a sinking fund to be provided by the aided corporations for the payment of their debt to the State, by the application of earnings *to the purchase of State bonds*, to be delivered to the State, in anticipation of the maturity of her own obligations as stipulated on her bonds.

V. Statement of the Statutes of 1852, and Amendatory Acts.

Upon the facts of the case then, and upon them as they are affected by the statutes of 1869 and 1870, the defendants confidently assert, the complainants can make no claim for the relief they pray.

If they are entitled to any relief, their right must be found in the act of the 11th February, 1852, and such acts as entered into the contract which they made, or to which they acceded when they acquired the bonds they sold.

Let us then examine those statutes.

The act of 11th February, 1852, in the twelfth section, declares, "The State of Tennessee expressly *reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act*, but in such manner as not to impair the vested rights *of the stockholders* of the companies."

As before remarked, the act in its inception was a special act in aid of a single corporation. The first nine sections mentioned only the East Tennessee and Virginia Railroad Company.

After stating the pre-requisite condition to be certified to the Governor, it is enacted in the first section, the Governor is authorized to issue to the Company coupon bonds of the State, at the rate of $8,000 per mile, for a section of thirty miles. The Governor was to be satisfied that this section was subject to no other lien than those created by the acts of 1851–2, in favor of the State.

It is to be observed that by a previous act of this session, viz: January 15th, 1852, other bonds for bridge purposes had been authorized to be issued to this Company; hence the language, liens created by *acts of* 1851–2, instead of by this act.

Section 3 declares the purpose to which the State bonds so loaned shall be applied, and empowers the Governor to appoint an agent to act with the President of the Railroad Company in negotiating the bonds.

Section 2 declares, that so soon as the bonds for the first section shall have been issued, "they shall constitute a lien thereon;" and "the State of Tennessee, upon the issue of said bonds, and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the Company, for the payment by said Company of said bonds, with the interest thereon, *as the same becomes due.*"

The language in the corresponding provision of the Bridge Act, January 15th, 1852, is "said bonds shall, on the issuance thereof, constitute a lien," and "the State shall be invested with such lien, *on and by virtue of the issuance of said bonds,* without a deed from the Company, for the payment of said bonds and interest accruing thereon."

Section 4 provides for State bonds to be given to the Company, at the same rates for additional sections of the road as the

same are prepared "upon the terms and conditions hereinbefore provided, and upon the issuance of the said bonds, the State of Tennessee shall be invested with a like mortgage or lien, without a deed from said Company, upon said first and additional section or sections * * * * for the payment of said bonds and the accruing interest thereon, * * * * * * * and when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien, without a deed from the Company upon the entire road, including * * * * * * * for the payment of all said bonds issued to the Company, as provided in this act, and for the interest accruing on said bonds. And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for the Company to give * * * * * any lien, incumbrance or mortgage of any kind which shall have priority over, or come in conflict with the lien of the State herein secured." Any such lien is declared void, and "the said lien or mortgage of the State shall have priority over all *other claims existing or to exist* against said Company."

Section 5 directs that said Company shall *deposit in the Bank of Tennessee, at Nashville, at least fifteen days before each instalment of interest on said bonds becomes due, an amount sufficient to pay such interest, including exchange and necessary commissions,* or furnish evidence that the accruing interest has been provided for.

In default of thus doing, the Governor was at once to take possession of the road and assets of the defaulting Company by a Receiver, and collect and apply the net proceeds and revenue to pay off such unpaid interest which the State shall have paid.

Section 6 provides, if the Company fail to pay the bonds, or

any of them at maturity, proceedings for a receiver, foreclosure and sale, shall be at once taken in the name of the State, and (section 14) if deemed necessary, the property may be purchased by the State, and thereafter managed and operated for the State by a Receiver.

Section 7 directs that at the end of five years after the completion of its road, the Company shall annually apply one per cent. of the aggregate amount of the State bonds received by it, to the purchase of bonds of the State of Tennessee; it shall assign such purchased bonds to the Governor, and then pay them into the Treasury; for this payment the Governor shall give a receipt to the Company; and the payment thus made shall be a credit to the Company in its account with the State, of bonds issued by it.

This section then directs, that the bonds so paid into the Treasury, and interest accruing thereon, shall be held and used by the State as a sinking fund for payment of the bonds it had issued to the Company at maturity; but if among the bonds so paid into the Treasury there were any of the bonds originally issued to the Company, they should be allowed as a credit, and cancelled.

If the Company failed in any of these annual payments, its property was to be sequestrated and dealt with as provided in the fifth section, as if the Company had failed to meet the requirements in relation to interest.

Sections 8 and 9 provide for collateral matters.

Section 10 extends the provisions of the act to other Companies, which are named.

Section 11 prescribes the guage to be used by the several roads.

Section 12 retains the power of legislation and has been already quoted at length. (p. 10.)

Section 13 provides, that in case the bonds issued to any Railroad Company have been obtained fraudulently or in violation of the terms of the law, the road of such Company and assets, or a sufficiency shall be sold and proceeds paid into the Treasury of the State, and vested in stocks for a sinking fund; the Company shall forfeit its privileges, and the stockholders shall be held for payment of the bonds so fraudulently obtained.

Section 14 authorizes purchase for the State, of any road sold under the provisions of the act.

Section 15 makes the act a public act for all purposes of notice.

Section 16 provides for collateral matter.

Section 17 entitles the State to two directors in each Railroad so aided.

Section 18 provides for the endorsement and guarantee by the State of certain Railroad Companies bonds.

Section 19 contains collateral matters with regard to particular Railroad Companies.

Section 20 makes a limit of time, within which the first section of any Railroad Company seeking aid must be completed.

Later acts modified the annual payments that were required to be paid into the Treasury.

The payment required by section 7, act of 1852, to be annually made after the expiration of five years from the completion of the road, was as much or as many of the bonds of the State as one per cent. upon the amount of the loan expressed on the loaned bonds would purchase. These bonds so acquired

were to be assigned to the Governor, and then paid into the Treasury. This rate of payment was subsequently, by act of 21st Frbruary, 1856, changed from one per cent. to two per cent.; then, by act of 20th March, 1860, to two and one-half per cent.; then, by act of 23d November, 1865, to four per cent. By this last act, this payment to the sinking fund, was for a time remitted.

By an act subsequent to 1852, the loan was increased from $8,000 to 10,000 per mile, and the aggregate was increased by the loan of money from the State, to aid the Railroad Company in building bridges.

By an act of 1873, the State agreed to fund past due coupons upon the loaned, as well as other State bonds, and such additional coupons as would mature prior to 14th of January, 1874, in new bonds of the State. This plaintiff appears to have accepted this offer: he now only demands interest due on and after 1st January, 1876: he appears to have received his interest from the State for the years 1874 and 1875.

By an act 21st February, 1852, which was passed in order to furnish the holder of State bonds, with coupon bonds, in place of former bonds issued by the State, without interest coupons attached, among other things, it was provided that the cost of preparing the bonds to be loaned the several Railroad Companies under the acts of that session, should be paid by the Railroad Companies: that the coupons should be signed and numbered by the Comptroller; the bonds themselves to be countersigned and numbered by the Secretary of State—and therefor, when delivered, he was to take a receipt in a well bound book, stating the number, date and amount so delivered to any Railroad Company authorized to receive the same.

VI. Remarks upon the Act of 1852, and the Acts amendatory thereof.

These statutes are the declarations of a sovereign State, in the exercise of its power for the advancement of the public weal. The object in view is the public improvement of its territory and people, by the use of the public credit. The parties with which it proposed to deal, were creatures—corporations organized by its own authority, and clothed with powers granted by itself. The sovereign proposed to loan its bonds, which were equivalent to money, or equal to money as shown by the evidence, to these, its creatures, upon conditions which it propounded to them, and which they were free to accept or reject, upon their own judgment of their interest; and, as to them, it reserved full power to change or modify its enactment at its own discretion, subject only to the limitation, that its future alterations should not impair the vested rights of *their stockholders.*

The provisions of this act, so far as they are connected with this question, may be expressed, as follows: The State of Tennessee in effect, says to these corporations, if you will complete a section of your road so as to be ready to receive the rails and superstructure, at your own expense, and without leaving it encumbered with any lien to come in conflict with my security, I will aid you in the purchase of the needed iron and materials, and will continue so to aid you by sections, till your line of road is completed. My aid will be by the loan to you of my obligations, or bonds, *to be issued to you* payable in the future, with semi-annual interest: my bonds so loaned shall not be used for any purpose other than procuring iron and superstructure for the completed sections of roadway for which they are loaned. The fraudulent obtaining of these bonds by any corporation, or

its officers, shall be punished by forfeitures and criminal prosecution. I retain the power to appoint an agent to act in conjunction with your officers in the negotiation of the bonds for said purpose, and to act in any other matter where *the interest of the State* may require it. As soon as the said bonds, which I loan to you, are issued to you, they shall constitute a lien upon the sections for which you receive them, and on completion of your road, upon the whole line, including capital stock and equipments. By virtue of their issuance, said lien or mortgage, without deed, shall at once vest in me, for the payment of said bonds, with interest, as *the same becomes due ;* or, as expressed in the 4th section, "for the payment of all of said bonds issued to the Company as provided in this act, and for the interest accruing on said bonds." And after the issue to you of my bonds for the first section of your road, you shall not, in any manner, create any lien or incumbrance of any kind to come in conflict with my said lien: and my lien or mortgage shall have priority *over all other claims* existing or to exist against you.

After thus announcing the general scheme of aid to these corporations, the State, in the 5th section, proceeds to speak specifically of the mode in which the aided corporations are to meet the demands of the State, in the payment of the interest they were required to pay. The interest specified in the bonds themselves, which the State issued to the corporations, and thereby bound itself to pay to the holder, is made payable on the 1st January and July, in each year. But the interest required to be paid by the aided corporations was payable by them at Nashville, in December and June preceding, "at least fifteen days before" the time expressed in the bonds and coupons. Not only were these corporations to pay this interest at this time, but they

were also then to pay exchange and the necessary expenses of transferring the money thus paid in advance at Nashville, to the place of payment named in the bond. This payment at Nashville to the Bank of Tennessee to the credit of the State, could only be avoided by the corporation *then* showing that it had, at that time, actually *already taken up* the coupons maturing fifteen days afterwards, or had then provided the money whereby it would be taken up, at the place of payment named in the coupon. This was no demand that the Company could disregard; stringent measures were provided for its enforcement. If the Company neglected this matter, which was declared to be its duty, an immediate seizure of all its property by the State was provided for, and the executive power of the State was at once to be put in motion, to effect the sequestration thus threatened. The prompt retirement by the corporation at its maturity, of the interest coupons, would not exempt the corporation from this seizure. By this provision of the law, which was one of the terms of the contract between the corporation and the State, the payment by the corporation of the interest it assumed to pay, was a very different thing from the payment of the interest stipulated in the bond—different in amount—different in place of payment—different in time of payment—different in the party to whom to be made, and different in the party by whom to be made—and was secured by a duty to the State, and a lien vested in the State, and a stringent remedy in *favor of the State*, with which the bond-holder had no concern, and which he could not enforce. The contract for payment of interest by the Railroad Company, was a contract with the State and not with the bond-holder, and was secured by means only to be exerted by the Sovereign, and utterly inconsistent with any notion of a remedy within the power of a citizen to apply.

It thus clearly appears from the very terms of the statute, that the contract for payment of interest by the Railroad Company, was with the State, and collateral to the contract of the State with the bond-holder upon the bonds, and for the protection of the State in the liabilities it had assumed; it was different and entirely distinct from the contract the State had made upon the bonds it issued to the several aided Railroad Companies.

Section 7 of the act, brings to view the provisions of the contract for the payment of the principal of the debt created by the several Railroad Companies under their dealings with the State under this statute, as section 5 had already declared the mode in which the interest upon the loan was to be paid. This 7th section requires the creation of a fund by the Railroad Companies in the hands of the State, for the gradual payment to her of the amount of the loan she had made to them. The State had bound herself by her obligations to pay the principal sum expressed therein, at the end of a period of thirty or forty years from their date. As this was a loan to Railroad Companies, of course, the State expected to be repaid the amount of her loan; and as it was a loan without pecuniary consideration to her—an accomodation to them, she had the right to be indemnified against the expense attending the transaction; for example, the cost of preparing and recording the bonds, and the expense of placing and disbursing the money, at the place stipulated for payment by her of the interest she promised to pay on her bonds, and to demand the payment to her of the principal sum of her loans, at such time as would enable her conveniently to meet the obligations she had assumed for the convenience of her beneficiaries. In this section, as in section 5, the State undertook to deal with her debtors about *a debt they had contracted with her.* At that

time the State was in abundant credit. Her securities were selling in the money market at a premium. There was no occasion to sustain her credit by the offer of security in any form to buyers of her bonds. Her simple promise to pay carried with it confidence in the investment. Her loan to any party of her funds, was a valuable consideration, and sufficient to support any engagement such aided party might make with her for payment of the debt such loan created; as much so as the loan of its notes by a bank, is a sufficient consideration for the discounted note delivered to the bank. In this state of things, she loaned her negotiable bonds to these Railroad Companies, and thereby became their creditor to the amount of the loan,—the face of the bonds. Being such creditor, in this 7th section, the State provides the mode of payment of the princi al debt; and that mode is by installments, to be paid by these debtors after a sufficient interval to enable them to earn a revenue from the improvements she had assisted them to make. If the State had in return taken from the aided Companies their mortgage bonds, or their covenants to the effect declared in the acts, under which she issued her bonds to them, the relation between the State and the aided Companies would have been precisely what it is now. These acts form the contract and the covenant which the aided Companies made with the State; sections 5 and 7 of the act of 1852, and the subsequent acts of 1856 and 1860, and later upon the same subject, express the engagements assumed by the aided Companies, as to the payments they were to make to the State, the consideration being the loan made by the State to them of her bonds whereon they had realized money which they used in their respective enterprizes. As between themselves and the State, they in fact had received money. This created a debt

from them to her, which bore interest till repaid; and which they assumed to pay. They entered into particular stipulations with her, as to the mode, manner, time and place of payment, both as to this interest and principal. They entered into stipulations with her as to the security she was to have that the stipulations of payment would be performed. How the State obtained the money she loaned, was of no consequence to them. So long as they received from the State value for their stipulations to her, there was consideration for their engagements. The contract between the parties, which in this case is expressed in the statutes, was made exclusively between the State and the aided Companies. The act became a contract, when the latter received the aid and accepted it on the conditions declared in the act. The contract was executed when the aided Companies received the bonds of the State. The receiving Companies then became the holders of the bonds, and had in their hands the securities on which, at their desire, money could be realized. At that point of time the contract speaks, and declares the relation of the parties who had formed it to-wit: the State and the aided Companies. At that point of time the Companies were the holders of the State bonds, and no other parties were interested in them, and since then, the Companies have made no engagements with any parties in relation to the bonds, except that arising from the contract of sale.

Otis vs. Cullom, 2 Otto Rep., 447.

The acts of 1852 and amendments, nowhere name or describe holders of the bonds therein provided, except as the Railroad Companies to whom they were to be issued: they nowhere make any provision for subsequent holders for any purpose. The act provides for bonds to be issued by the State to Railroad

Companies, and directs their amount, date, rate of interest, time of payment, and recognizes the fact that the State was thereby creating a liability against herself. It recognizes the fact, that without pecuniary profit to itself, the State proposed to loan these bonds to certain of her corporations, and as a matter of justice to herself, that these corporations should indemnify her against the liability thus assumed. As a matter of justice also, that these corporations should so contract, that their payment to her of interest upon their debt should provide the means for the payment by her of the interest she had undertaken to pay: as a matter of convenience to the aided Companies, and of justice to herself, that small but regular annual payments on the principal of their debt to her, should be made and at the same time their efficiency as payments secured for her own indemnity against her own future liability, by investing the same in the evidences of her own debts. It was a matter of indifference to her which of her liabilities were retired, provided only they were retired.

The nature of the transaction the State proposed to engage in, necessitated for its explanation the reference to, and the language which was used in the acts of 1852 and subsequent acts, in relation to the bonds of the State, and their payment, and the security to be given to the State for payment to her of means to meet her engagements, and to indemnify her, in case of payment by her of her obligations, her reimbursement by the benefited parties of the amount she might actually pay out, in advance of the payment of their debt to her. These considerations, and they are germain to the subject, 91 U. S. R., 79, amply account for the general language found in portions of these acts, in relation to these bonds, and the liens provided for the indemnity of the State, in the debt upon her bonds.

It is upon such language our opponents rely for success, but nowhere in the act is there recognition of any right in the bond-holder to any lien or right of any kind against the Railroad Company: the language of the bond declares their rights.

No where is such holder mentioned, while the whole tenor and langnage of the act, even in those portions which are put forward by our opponents, as their support, entirely comport with the views of the defendants and their answer.

Phraseology similar to that of this Tennessee act, is contained in the charter of the Union Pacific Railroad Company, (12 U. S. Stat., 492-3) thus: "the issue of said bonds and delivery to the Company shall *ipso facto* constitute a mortgage," &c., "the grants aforesaid are made on condition that said Company shall pay said bonds at maturity, &c." And yet the act declares that the money earned by the Company "for services rendered for the Government, shall be applied to the payment of said bonds and interest," and after the completion of the road, "at least five per centum of the net earnings of said road, shall also be annually applied to the payment thereof," and "said Company may pay the United States, wholly or in part in the same or other bonds, Treasury notes or other evidences of debt against the United States to be allowed at par."

It will not be contended upon the other side, that the effect of this language declaring a lien, enures to the holders of the bond, and converts the United States into their trustee. The general language describes the general nature of the transaction, while the scope of the scheme and the particular language, as in this Tennessee legislation, declares the relation of the contracting parties and creates a debt with specific security to the Government as the lender of the money or bonds.

The practice and dealing of the State with the subject, in its legislative enactments, its executive action and judicial orders and decisions, from that time to the present, have been adverse to the claim now advanced by complainant, and in perfect accord with the defence. In this case of the Mobile and Ohio Railroad, the record shows a settlement with the State in 1871-72, and upon this theory, wherein more than a million and one-half of State bonds were received by the State in perfect good faith. The history of the State in the settlements with its aided Railroad Companies, shows the return to the State of nearly $15,000,000 of her bonds, by or on account of Railroad Companies which have settled with her, and of the payment of nearly $7,000,000 of State bonds by parties which have purchased lines of road, under assertion of the right of the State, making a total of some $22,000,000 of State bonds, which the State has received in settlement and discharge of liens she asserted against Railroad Companies as created under these internal improvement acts.

The holders of outstanding bonds of the State issued under that system, during all the time of these settlements of millions, and during the period intervening between the original suspension of payment of interest by the State, in 1865-6, and the filing of this bill, have acquiesced in this view, and refrained from attempting to dispute it. There has been long continued construction of these acts, and of acquiescence therein, which settles the right.

The argument drawn by the defendant from the status of the State in 1852, from the form and incidents of the contract which the holders of the State bonds present on the face of their bonds,—(which is all the evidence of contract which they pos-

sess)—from the provisions of the 5th section of the act of 1852, which contains the direct and positive, and the only direct and positive obligation of the aided Companies, for the payment by them of interest upon their debt is thus demonstrated and confirmed by the cotemporaneous understanding, and the practical construction of all parties interested in, and connected with the settlement of questions and rights under that system of improvement and scheme of legislation—that liens and securities thereby provided upon the property and rights of the aided corporations, were intended, and were alone held for the benefit of the State of Tennessee, and to secure to her and for her use, the payment of the money the said corporations assumed to pay, on account of their dealings with the State.

But the argument does not stop with the 5th section of the act of 1852. That section provides for payment of interest; and very conclusively shows that the contract by the Companies to pay interest, was a contract to pay interest *to the State, not the interest contracted by the bonds to be paid upon them by the State,* but upon the distinct debt of the aided Companies to the State, and is in all its particulars, a contract entirely distinct from that represented by the bonds and coupons.

Section 7 of the act of 1852 presents the same argument for the defence as that drawn from the 5th section, and has been partially developed. I desire to dwell a little more at large upon it.

The reservation of the right by the State to make further legislation contained in the 12th section has been mentioned. Its language is comprehensive. It indicates too plainly to be disputed, the intention of the law-maker, and the understanding had by it, and by those who accepted the benefits of the act, of

the purpose of the liens and securities declared by the act, and for whose benefit they were created.

The complainant in this litigation is claiming under the act of 1852: his contention is that the act declares that the bonds he holds constitutes the lien he asserts, and that the vesting of the lien in the State is as trustee for his benefit. He must therefore stand or fall by the act, construed from all its parts; and not from isolated expressions torn from their context. Section 12 binds him and his co-bondholders, as completely as it bound the aided Railroad Companies. That section reserves full power in the State of Tennessee, to enact all such laws as may be deemed necessary to protect the *interest of the State*, and to *secure the State* against any loss in consequence of the issuance of bonds under this act. The issuance of these bonds was thus recognized as creating a debt from the State; its protection against loss by reason of the debt, is the object of the reserved power. This reservation of power is without limit. It is not necessary to discuss the extent of power usually reserved in these later days, in the enactment of corporate charters. Admit that it is not a power of wanton legislation; here the reservation is of the power to protect the State against loss. It is in accord with the terms of the act itself, and explains the object of the act in the provisions relating to liens and securities. The object of this act was the protection of the State: and the power of protection is still further retained, in the reservation of the right to enact further legislation. The holders of the State bonds took them with this declaration of purpose, both in the act and in the reserved power, to add to the security and indemnity of the State.

Under this reserved power, the provisions of the 7th section were altered. As before remarked, that section provides the

mode in which the aided Companies were to pay their debt to the State, thus: after an interval of five years from the completion of their lines, the aided Companies were to invest one per cent. of the amount of State bonds, (in other words, to purchase one State bond of $1,000 for every $100,000 of bonds received by them,) and after assigning these purchased bonds to the Governor, pay the same into the Treasury. This was *pro tanto*, a payment of the debt to the State. The State thereafter managed the matter. In the meantime, the aided Railroad Companies as provided in the 5th section, continued to pay to the State, through its fiscal agent, full interest upon the whole amount of its original debt. The State thereafter, took so much of this interest so paid, as applied to the debt created by the loan, equal to the amount of the bonds so paid in, and used and applied it, with the bonds so paid in, as a sinking fund for the payment, when they matured, of the bonds she had loaned to that Company. If the annual payment under the 7th section contained bonds which had been originally issued to the Company so paying into the Treasury, as to them the transaction was ended. By such payment of such bonds into the Treasury, of course those bonds were paid, the State had no longer to pay interest on those bonds; still, however, the aided Companies continued semi-annually to pay interest upon the whole of its debt. A careful calculation of the operation of the plan prescribed by the 7th section of the act of 1852, shows that if complied with, it would place in the Treasury of the State, all the bonds it had loaned to the aided Companies before the time appointed for their payment. Of course there was room for failure in the perfect working of the scheme. Perhaps, the credit of the bonds would raise their market value, and they could not be purchased at par,

or at a reasonable price, or for some other reason, the payments into the Treasury by the aided Companies might fail to absorb all the bonds the State had issued: in that event, the scheme of indemnity is still maintained, and payment of the debt created by the issue of the bonds to the defaulting Company, and the indemnification of the State is to be obtained by a bill in Chancery in the name of the State, praying foreclosure and sale of the road and property of that Company. This proceeding is directed by the 6th section of the act, and its purpose is there declared to be the indemnity of the State.

The sanction prescribed for the enforcement of the 7th section of the act is the sequestration of the property of the defaulting Company, under the orders of the Governor, and the management of the same by an agent of the State. This management of the property under both the 5th and 7th sections of the act, is to be in the interest of the State, and the officer in possession and so managing, is to settle his accounts with, and pay his balances into the Treasury of the State. In the event of the sale of any road and property under the provisions of the act, the State was to be represented, and its interests protected by an agent of the State with power to buy in the same for the benefit of the State. If a purchase were made by the State, evidently the payment would be by credit of the amount of the bid upon the debt of that Company to the State.

It thus appears from an examination of the 7th section, that it contemplates payment of a debt from the aided Companies to the State: not the payment to the bondholder of the debt evidenced to him by the bonds of the State, which he may hold—but a payment to be made by annual installments to be furnished by the aided Companies, during a series of years, while the bonds

of the State are running to maturity, and all of these payments to be made, before the bonds could reach maturity, so as to be capable of collection by their holders. To enforce these installment payments, a peculiar remedy was devised; a remedy, which from its character, could be put in operation only by the sovereign power, and not at all within the power of any private party, citizen of that or of any other State, to call into operation, and capable of being used by that sovereign power, long before the bondholder had any matured obligation of any party. The object to be secured by this remedy was peculiar—and not such as the bondholder had any right to demand—an object entirely inconsistent with his right, and with the terms of his bond. His right is to payment of the principal of his bond in the whole at the time specified, with interest intermediate between its date and time of payment; also, at certain named time and place. He can demand those terms of his obligor, and his debtor can demand no other terms from him, and cannot insist upon any the least modification of those terms, much less can any other party make such demand.

Under this act, however, the aided Railroad Companies are required to make payment, not at the maturity of the bond—not at the place of payment named in the bond—not to the person who holds the bond—not in money as stipulated in the bond—but in annual installments, at the Treasury of the State of Tennessee, to that State, and in bonds of the State. It thus plainly appears that the debt represented by the bonds of the State, is not the debt of the aided Companies, and their creditor is not the holder of those bonds. The creditor of the aided Companies is the State of Tennessee. This arises by contract with the State, which is distinct from, but collateral to the contract of the State with its

bondholders upon the bonds, and for the protection of the State in the liabilities it had assumed by the issue of its bonds. The debt of the aided Companies is different and distinct from the debt of the State—is due to a different party, and payable in a different manner, and cannot in any way be controlled, except with the concurrence of the creditor to whom it belongs: and that is, the State of Tennessee.

Under the power reserved in the 12th section, by the act of 1856, (and that was prior to the receipt by the Mobile and Ohio Railroad Company of any of these State bonds) this annual payment to be made by the aided Companies to the State was increased to two per cent. upon the aggregate of the bonds issued to them, payable in money, to be invested by the State Commissioners in like bonds of the State. This, of course, would accelerate the retirement of the bonds of the State. In 1860, this annual payment was increased to two and one-half per cent., and later other alterations of the required annual payments were made.

Now, all these changes show that the contract on the part of the aided Companies was with the State alone—with which the bondholders had no concern—and the liens and securities that were taken from the Railroad Companies were upon this distinct contract, for the benefit of the State alone.

These securities were in no way attached to the debt which the State owed upon her bonds. The State acted for herself and contracted for herself, taking securities for herself, and to ensure to herself the performance of engagements made with her and for her benefit. It is true, she required them, because she had made engagements of liability, and for her indemnity against loss by that liability, but acting as a sovereign, she claimed and

demanded these duties for herself, and to be controlled by herself according to her good pleasure, and not in support of her plighted faith and pledged word, and as security to the holders of her bonds, in support of her own obligations. The whole scheme of the act is upon the theory of a sovereign acting; upon the one side entering the market to borrow upon the faith and credit of her public securities, at that time untarnished by any failure to honor her engagements: upon the other, loaning to her citizens the proceeds of those securities for the advantage of her people, and the improvement of her territory, upon contracts and securities executed by her beneficiaries directly to herself and for her benefit and advantage.

Fair and legitimate criticism of the legislation of the State of Tennessee and her acts, in her schemes of internal improvement, can lead to no other conclusion of her intention and of the construction to be placed upon her statutes, and the engagements she required of her loanees, and which they willingly assumed.

VII.

The case shows that by contract under the acts of 1869 and 1870, the State has in fact assigned its right and liens against the Mobile and Ohio Railroad and its property to Wm. B. Duncan, A. Iselin and R. T. Wilson. This assignment was for full value by them paid to the State: and the lien or mortgage is now held by them in trust for the present holders of new bonds of that Company, which were issued with the authority and approval of the State of Tennessee, under its deed of July 1871. These gentlemen claim to hold this, the first lien upon this property, with rights established by decree of this Court. They are

in possession of the property under title derived from the State, with title recognized by the Railroad Company, by the agency of a Receiver appointed on their bill by this Court. This complainant, by his bill, is seeking to subject this possession of the receiver and of these trustees, to the use of the holders of the bonds, that were issued by the State of Tennessee to this Railroad Company, upon the averment that the holders of these bonds are entitled to the very same lien, which said trustees claim. These trustees are therefore necessary parties to this bill, and the very parties whose rights are assailed by it. Yet they are not brought in as parties. Till they are brought in, there is no proper party before the Court to litigate the question raised by the bill.

Their citizenship in New York, where the complainant resides, makes no excuse for their not being made parties. Here is a suit in Equity in the Circuit Court of the United States for the Western District of Tennessee, in relation to a lien upon the property within the District wherein the complainant is seeking to enforce that lien against these non-resident defendants. It presents precisely the case provided for by the act of Congress of 1875.

17 U. S. Stat., 198. Desty Fed. Pro. 116.

It is therefore insisted, that Messrs. Duncan, Iselin and Wilson, as such trustees, are necessary parties to this litigation; and unless made parties, the bill must be dismissed.

VIII.

The record shows that Messrs. Duncan, Iselin and Wilson, claim as assignees of the State of Tennessee—that they paid to that State in money and in bonds the sum of $1,684,800; and in

consideration thereof, received the assignment of its lien or mortgage upon the railroad and property of the Mobile and Ohio Railroad Company, and under that title with the assent of the Railroad Company, went into possession. If the transaction on which that amount was delivered by them to the State was invalid, there results a failure of consideration on the part of the State, and the securities received by her should be returned. The State of Tennessee is, therefore, a necessary party, and should be before the Court. She claimed to be the owner of the lien upon the property of this Railroad Company, and dealt with it as her own. She claimed the benefit of peculiar remedies, created by herself. She claimed to be the owner of the debt, and dealt with the assignees as such owner and assigned her right to them, and under that title they are in possession of the property.

But she cannot be sued—and is not amenable to this jurisdiction, therefore, the complainant infers, the State need not be made a party, and that he can proceed, against this Railroad Company and its property without her presence and without the presence of the parties, who are in possession under her lien and mortgage, and who have enforced that lien and mortgage by virtue of the right she reserved to herself. This defendant denies the inference. It is true the State of Tennesse cannot be sued. It is admitted, that in a proper case, as between parties, who are by their nature and character liable to judicial jurisdiction, but who from defect of power in the Court, before whom the matter is pending, cannot be made parties, if the Court can decide the case between the parties before it, it may proceed to adjudicate the matter, but without prejudice to the absent party. The act of Congress, 5 U. S. Stat., 321, provides

for this condition of things, when it arises from the limitations imposed upon the Courts of the United States by their Constitution, in relation to citizenship of parties. But this result does not obtain when the absent party, who cannot be brought in, is a necessary party to the litigation. Such parties are described as "persons who not only have an interest in the controversy, but an interest of such a nature, that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with Equity and good conscience."

Shields vs. Barrow, 17 How. R., 130.
Barney vs. Baltimore, 6 Wall. R., 284.

This description very fitly applies to the condition of the State of Tennessee in this controversy.

She cannot be made a party, not because of non-residence, or any limitation of jurisdiction by reason of citizenship, in the Courts of the United States. *She is not amenable to the jurisdiction of any Court whatever.* Her submitting herself to any Court would be purely an act of grace; and if she so appeared, no decree of any kind could be enforced against her.

South and North R. R. Co. vs. Alabama, 101. U. S. R. 832.
R. R. Co. vs. Tenn. Ib. 337.

The principle as applied to a State, received illustration in the decision of Mr. Justice Bradley, in Branch vs. M. & B. R. R. Co., 2 Woods R., 385. The Court was there asked to interfere by Receiver with property in possession of agents of Georgia, on a claim of lien for aid furnished by the State to the Railroad Company by her endorsement of the Company's bonds. The application was made by the holder of bonds which the State had endorsed. It appeared the State disputed the validity of her en-

dorsement or that issue of bonds, but recognized her endorsement of another series of bonds. She was thus, in each case, on the face of the bonds, a surety for the obligor, the Railroad Company, and had taken from the principal debtor, security to insure her protection as endorser of the bonds. The claim of the complainant as remarked by the Court, was based on "the well-known principle of equity, that a security given by way of indemnity to a surety, may be reached and applied directly to the payment of the debt, and the surety cannot prevent such application." Notwithstanding this equity, (which does not exist in our case) the Court finding "the State had provided the security for its own indemnity, to be managed in its own way, by its own officers and agents," held it had no jurisdiction to grant the relief prayed. The nature and character of the surety, being the sovereign power of the State and not amenable to the jurisdiction of the Court, deprived the Court of all power to hear the case. If the State of Georgia were a necessary party in that case, when if between citizens, the complainant did have equity, because of the nature of the contract—much more in this case, where that basis of equity is wanting, and where the State has received full payment of its demand from innocent parties upon its own invitation, and has put them into possession, is the State a necessary party to the bill. If in that case, jurisdiction failed by reason of the character of the creditor to whom the securities belonged, being sovereign and not amenable to any suit, so here the jurisdiction invoked by this complainant must equally fail, both on the merits as exhibited by the acts of 1852, and subsequent date, and on the law attaching to the case from the character of the parties. As heretofore suggested, the character of the contracting party, the State, *of itself*, goes far to show the real nature of the transaction, as intended and understood at the time it was made, by the parties who entered into it.

IX.

In some of the cases which have arisen upon State aid to railroads and other public improvements, the State gave her assistance, by endorsement or guaranty of the obligations of the borrowing Company, and reserved to herself indemnity, by way of a lien, in the nature of a mortgage upon the property of the aided Company. In such cases, it is admitted, the principle of subrogation would apply, if the parties were private citizens.

The application of this principle has, in some case, been permitted by the Court, where the State was the surety of the principal debtor—the last being subject to the jurisdiction of the Court. An example is found in a decision by Judge Woods, in 2 Wood's Rep., 612. In that case the State of Alabama had endorsed the bonds of a Railroad Company, and the holders of those bonds were allowed to proceed with foreclosure proceedings, without the State appearing in the suit. The notion of the Court evidently was the notion expressed in U. S. Bank vs. Planters' Bank, 9 Wheat. R., 904, that the State by that mode of contract, *pro hac vice*, intended to divest herself of her sovereign character.

In that case, the State neither by any declaration of her own, nor by any act of taking possession of the mortgaged property, or asserting by judicial proceedings or otherwise, her right to apply the same, or enforce the lien, indicated any desire to deal with the property under her reserved right. She appears to have been content to let the property be applied to the discharge of her own liability, upon the action of the holders of the bonds. She acquiesced in the proceedings of the Court. In our case, however, the State has been active in the assertion of her right and power over the property.

Without, however, stopping to discuss the propriety of this ruling of the Court in 2 Woods Rep., or to compare its merits and authority, with the decision of Justice Bradley in the same volume referred to in the last preceding subdivision of this argument, it is sufficient here to say, this case and that are not parallel. Here there are no bonds of the Railroad Company endorsed or guaranteed by the State. The complainant holds no bonds on which the Railroad Company in any way appears, and holds no bonds of the Railroad Company, on or about which the State assumed any responsibility. He holds only the plain unconditional obligations of the State to pay money at a given time and place.

The character of such obligation is pointed out in Crouch vs. Credit Foncier, L. R. 8 Q. B., 384. "There can hardly be said to be any right of action on such instrument at all, though the holder has a claim on a foreign government." This remark is adopted by the Vice Chancellor, Sir C. Hall, L. R. 5 Chy. Division 611, Twycross vs. Dreyfus: and it is based on the exemption from suit of the sovereign who becomes an obligor by the issue of such bonds. The principle is recognized as extending in its operations to collateral contracts by that sovereign with other parties, when the declared object of such collateral contracts, was the establishing a security for the observance of the stipulations of payment contained in the original obligation. In the case last cited, English subjects, the holders of bonds issued by the Republic of Peru, sued other English subjects, the consignees in London of property shipped to them by the Peruvian government, and prayed the application of the proceeds of the sales of that property to payment of the amount of interest and principal due upon their bonds. They showed that by the con-

tract of Peru, those proceeds, after payment of earlier charges, had been promised to be pledged for the security of the bonds they held. These bonds had been negotiated upon these and other representations contained in the prospectus, which had been issued in behalf of Peru, with the assurance endorsed on the bonds, of such application of sales. The Court, however, held it had no jurisdiction in the matter, though the plaintiff had offered to make the government of Peru a party to the suit, and had given notice thereof to the Republic. The Court held it was essential to the case that the Republic of Peru should be a party, even though it may have said, "I do not make any claim to this fund." "Therefore, it seems to me the demurrer is one that goes to the root of the plaintiff's case," and must be allowed.

L. R. 5 Chan. Div. 616.

Upon appeal the decree of the Vice Chancellor was affirmed, without dissent. The Master of the Rolls, Sir George Jessel, remarked, "as I understand the law, the municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honor, binding, so far as honor can bind the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government, or even by the ordinary tribunals of the country which issued them, without the consent of the government of that country. This being so, it appears to me, the bond in question confers no right of action on the plaintiff, and on that ground it seems to follow the demurrer ought

to be allowed." This learned judge then examines the special circumstances of the case, as shown by the terms of the prospectus, and the endorsements of the bond. He finds that in their terms, and by the necessity of the case, a government being a party, there was reserved to the government of Peru, as a government, a discretion to ascertain what were proper prior charges to be paid out of the proceeds of the consignments (the corresponding discretion in this case is reserved to the State of Tennessee, in the right of legislation declared in the 12th section of the Act of 1852) before ascertaining the balance to be applied to the complainants' bonds, and therefore, the claim of the plaintiff could not be entertained by the Court or by any Court. The principle which is recognized by the Court in the case of Twycross vs. Dreyfus, is directly applicable in this case. This complainant is the holder of a bond of the State of Tennessee, with no other obligor or party liable upon it. That State is the principal and only debtor on the contract held by the plaintiff. It is an obligation of honor, with no power in the holder to enforce it. That obligor, which is a government and above the power of suit by any party, makes a collateral contract for its own benefit, but growing out of its own liabilities, with a third party, to be paid by it money, upon terms, at times, and in a manner to which that third party agrees; and retains the power to modify this collateral contract and its securities at its own discretion. Of necessity and by the very nature of the case, that sovereign obligor cannot be coerced by any tribunal to perform its obligations as to the payment of the money—much less can it be *coerced in its exercise* of that discretion which was reserved for its own benefit, or be called in question for the manner in which it has exercised that discretion or be made to refund to those with

whom it had dealt in its exercise, the moneys or securities it has received from them. But without this can be done, any disturbance of existing relations will produce injury or injustice to one of the parties. The want of jurisdiction over the State of Tennessee, necessarily extends to the whole controversy, and all the parties to it. The equity of the defendant requires the dismissal of the bill.

The same principle has been recognized and applied by Lord Romilly, Master of the Rolls, in Smith vs. Weguelin, L. R. 8 Eq. Cas., 198. The head-note indicates the point.

By a Convention between the government of Peru and a Peruvian Company, all guano to be exported from Peru to Great Britain and Ireland was consigned to the Company, and it was agreed that the Company should sell the guano, and hold a certain portion of the proceeds at the disposal of the government. The Peruvian government afterwards contracted a loan in England upon the terms, that all the Peruvian guano to be imported into Great Britain, Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds, a certain sum should be applied half-yearly in redemption of the loan.

Held in a suit by the bondholders of the loan (to which the Peruvian government was made a defendant, but did not appear,) that the Court had no jurisdiction, to compel the Company or their agents to apply the proceeds of the guano in the hands of the agents in England to the redemption of the loan.

An English Court has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England.

The learned Judge remarks "the Peruvian government are not here, and are not amenable to this jurisdiction, and the Court

is asked because the Peruvian government have entered into another and distinct contract, with the plaintiff in common with other bondholders to take an account between the foreign government and the foreign company, which can bind no one, and have no possible result." He concludes if the Peruvian government has not acted within the strict spirit and according to the true construction of the articles on which the loan was taken, "I think that is a matter in which this Court has no power to interfere."

In these cases, *the fact of a government*, a sovereign power, being concerned, though the application were in favor of British subjects, and to apply property within reach, and in possession of parties subject to the jurisdiction of the Court, for the payment of debts of the government, was held to place the whole controversy beyond the jurisdiction of the Court.

Vid. 6 Beav. R. 1.
S. C. 1 Ho. Lords, 657.
L. R., 9 Chan. Div. 351.
L. R., 1 Q. B. Div. 487.
L. R., 2 Q. B. Div. 69.

The principle applies with full force in the case now before this Court. The case of the complainant rests wholly upon his being the holder of the bonds issued by the State of Tennessee; he seeks the payment of his debt out of the proceeds of property originally pledged to that State, and pledged by a third party, upon another and distinct contract from that exhibited by the complainant. As held in those cases, the jurisdiction does not exist in this Court, to entertain the bill, in which the complainant seeks the intervention of the Court.

It is respectfully submitted that the cases of Hand, and of others against the Savannah and Charleston R. R. Company, et als, 12 So. Ca. R., 314, cited by counsel for appellants have no controlling influence on this case. In that litigation the State of South Carolina was the endorser of the bonds issued by the Railroad Company. She thus assumed a secondary liability to the holder of the bonds, while the direct liability to the holder was of the Railroad Company the maker of the bonds. On the face of the transaction itself the State became a surety to the holder for the payment of the bonds as they matured. Her contract with the holder was, "if the Railroad Company do not pay this bond when due, I will pay it." By her very contract she placed herself in that position where the equitable doctrine of subrogation might arise. Being the surety of the primary debtor, she took from that principal debtor, security by statutory lien on that debtors property for the payment *by said Company* of the bonds the Company had issued and which the State had endorsed, *as the same became due.*

In such case by a natural equity between the parties, it is considered that the creditor has a right to the application to the payment of his demand, of all the property and securities, which the debtor has placed at the disposal of his surety for the payment of the debt.

This equity the Court will apply in all cases when the relation between the parties of debtor and surety exist, and when its application is not otherwise forbidden by the terms or nature of the contract.

Hampton vs. Phipps, 108 U. S., 260.

In the case of Hand, it appears that there was nothing to prevent the application ot the doctrine. There was a principal

debtor and a surety in the possession of means whereby to protect itself by enforcing payment of the debt to which the suretyship attached. The Court held that the creditor had a right to the application of these means to pay the debt, which the surety had bound itself to see was paid by the principal debtor, or in case of his default, itself to pay.

The right of further legislation reserved by the endorser of the bonds, that is the State, to protect its interests and secure itself against loss, in consequence of its endorsement of the bonds of the principal debtor, did not change the character of the contract expressly undertaken of suretyship. In truth it may well be considered as a portion of the security which was furnished to the surety for its indemnity againt loss by insuring payment of the bonds as undertaken by the debtor. Consistently with the position it had assumed on the bonds by its endorsement, no legislation could be made by the State for its protection that would not enure to the benefit of the holder of the bond. And were it a matter of judicial procedure it might be claimed that if further legislation were needed to insure payment of the bonds by the Railroad Company, it would be the right of the bond-holders that the State should be compelled to exert that reserved power for their benefit without discussing the extent of power that exists as to the amendment or alteration of charters by the legislative authority, under the right to amend and alter now so commonly expressed in recent charters of incorporation, it is clear that in this case the State could pass no law under the power reserved in the act under which the State's endorsement of the bonds were made, that would either relieve the Railroad Company from payment of its bonds, as it had contracted or could impair the obligation assumed by the State up-

on its endorsement of the bonds. So it is conceived and respectfully submitted that the decision of the Supreme Court of South Carolina in the cases referred to can have no influence adverse to the position of the appellees in this case.

Contracts created by, or entered into, under the authority of statutes are to be interpreted according to the language used in each particular case to express the obligation assumed.

R. R. Co.'s vs. Schutte, 103, U. S., 118.

The statute involved in the case of Hand vs. R. R. Company, provided for a contract certainly defined, of endorsement by the State of certain described bonds. The evidence showed that that contract was exactly performed by the issue and endorsement of the bonds as authorized. The case shewed the relation of suretyship assured by the State to the holder of the bonds. The laws defined the results of that relation and the rights and duties of the parties respectively. The case is entirely different from that now before the Court. The application of the judgment and reasoning of that case to this involves assumptions in this, which the nature of the case and the proofs do not warrant. In this case, on no part of the bond was any suretyship for the R. R. Company assumed by the State to the bond-holder. On the face of the bond, the State is the only debtor—it is the obligor pure and simple—and does not make its liability in any way to be affected by the R. R. Company. On the face of the contract, the Company no where appears. The facts do shew that as between it and the R. R. Company, its assumption of these obligations, was a benefit to the latter, and without consideration from it, of a commercial or business character, but of such a nature as might operate upon the Sovereign, in the wise exercise of his powers. This issue of its bonds created a debt from the R.R.

Company to the State, to be discharged by a return to it of its bonds, and so the discharge of the State from the liability it had assumed upon the issue of its bonds. The liability of the R. R. Company is precisely the same as if it had received a loan from the State of an equivalent amount of money to be repaid in the future. The liability of the Company to the State is the liability of a debtor to a creditor, for the loan to it by the creditor of his credit. In this sense it may be said that as between them the State is a surety of the Company, but in no other sense is it a surety, and certainly not as relates to the bond-holder. It cannot be a surety to the bond-holder, unless the bond-holder is a creditor of the R. R. Company. To become such creditor, there must be a contract between them. No such contract was ever made. The bond-holder has no paper or obligation of the R.R. Company; the Company never assumed any obligation to him. The State never assumed to pay or guaranty any debt of the R. R. Company. It loaned its bonds to the Company, and reserved to itself, in so many words, *to the State*, a lien upon the property of the R. R. Company, to *protect the State* against loss by reason of the loan of its credit to the R. R. Company, and to secure the retirement of its bonds in the manner pointed out by the statute; that is by means of annual payments thoughtfully arranged, so as to place the State in funds to meet its own obligations at and before maturity, or by the R. R. Company itself paying up and retiring the bonds and the accruing interest.

A part of the security it reserved to itself, was the right to enact additional legislation "to protect the interest of the State, and to secure the State against any loss, in consequence of the issuance of bonds under the provisions of this act."

The security the State reserved is precisely the security which

would be taken by an actual creditor for value already advanced by him to his debtor, modified by the fact that the creditor is a sovereign law making power, and not a mere co-citizen of the debtor.

It is plain from an examination of the facts, that no such relation ever existed between the R. R. Company and the holder of these bonds of the State, as to make the former the debtor of the latter upon the bonds so that the State could ever get into the condition of a surety for the R. R. Company. Yet without this relation being established, there is nothing on which the equity claimed by this plaintff can stand.

108 U. S. R., sup.

The case of Railroad Companies vs. Schutte, 103 U. S., 118, is also cited by appellants in support of their position, but it is submitted, with as little propriety, as is their reference to the case of Hand. The remarks of the Court on page 140, find an application in the argument of the appellants here, but as there said, the object of the Court in each case, is to find out from the words used, what the *parties intended to do.* Every statute creating or evidencing a contract, like every contract must be read by itself; and in the end it must be determined from the language used in each particular case, *what has been done*, or *agreed to be done* in that case.

In the case of Schutte, the language of the endorsement by the State through its Governor upon the bond, is too plain to be misunderstood. The language is, "the State of Florida holds the first mortgage bonds of said Railroad Company for a like amount as further security *to the holder hereof.*" Here is a plain and direct recognition upon the bond itself, that the State, not in consequence of being a surety merely, but in fact, and by special con-

tract was the trustee for the holder of the bond, of a mortgage lien upon the property of the Railraod Company to secure the payment of the bond.

The 11th section of the act quoted on page 124 of the report, shows the provision in case of sale of the Railroad property to be in perfect accord with the endorsement of the bond. To wit—after directing that the purchase money shall forthwith be paid into the treasury of the State, the act directs "all moneys arising from said sale and paid into the treasury of this State as heretofore prescribed, shall be promptly and *exclusively* applied to the *payment and satisfaction of the bonds issued by the State* of Florida under this act, and in case the holders of *said* bonds do not present them for redemption within ninety days after said sale, the Treasurer shall invest the same, or any part thereof which may be remaining in his hands in the securities of the United States, to be held by the State of Florida, as *trustee for the bond-holders*, until such bond-holder shall demand the same."

These declarations, and the after conduct of the State in recognition of the trust in its hands, and its trusteeship for tbe bond-holders, as recited on page 147 of the report plainly show, what this Court in its opinion declared, that the transaction clearly indicated the intention to be "what the Governor when he made the exchange certified it to be, a security (in the hands of the State) for the holder of the State bonds." And thus the Court found the object of the Legislature was, not to create a debt which the State was expected to pay, but to aid the Company in borrowing money upon the credit of the State, and if the State did not pay its bonds, then the creditor had their own recourse upon the mortgage which the State had reserved upon the property of the Company.

"The State credit so far as the State and Company were concerned, was only to aid the Company in borrowing money on its own bonds. In any event, the Company was to be bound for the payment of the entire debt when it matured, and its property was to be given as security."

In the case now under discussion, the language and conduct of the parties and what they respectively agreed to do were widely different, as hereinbefore pointed out.

The State is the only debtor upon the bond. The name of the Railroad Company no where appears upon the bond in connection with the matter. It is true the State reserves a lien upon the property of the several Companies to which the bonds are delivered to secure payment to the State of the amount so loaned—not at the maturity of the bonds, but long before their maturity—not at the place where the bonds are payable. The State reserves to itself the right to enact further legislation, to protect its interests and secure it against loss. No where is the bond-holder referred to as a party to be protected or considered. The lien itself is expressly given to the State as its exclusive owner, with full legal right and title to deal with it as it pleases, not in trust for any other party, bond-holder or otherwise.

"In this case as in every other case of statutory construction, all depends on the intention of the Legislature, as shown by the general scope of the law."

In the present case is it not clear that the object of the Legislature was to loan its bonds to the Railroad Company and thereby create a debt from and by itself, which the State assumed to pay at maturity:—and in consideration of which the State reserved a lien to and for itself alone, to enforce the payment of the debt created to it by its loan of bonds, which payment was

to be made to it, in the manner provided by the act, or which might be provided by the subsequent legislation, which the State by that act reserved to itself the right to enact?

The whole scope of this scheme is variant from that in the Florida case. There is a careful exclusion of all right in the matter, in any other party than the State. The State issued its bonds, they were the only security she proposed and did give. She entered into no contract or engagement for any other security. When it loaned its bonds it retained a lien for the payment of the debt thus created to her from the loanee; but did not bind itself to the loanee, as to when the debt should be paid. It required by the act of February 1852, that this debt to her, (not her debt to any other party, nor any debt of the R. R. Companies to other parties guaranteed by her) should be discharged by certain annual payments to be invested in State bonds, but necessarily in these bonds so loaned. She did not say that this mode of payment should not be changed; so far from that, she did reserve the right to change this mode of payment, and did, in fact, by subsequent legislation alter that mode of payment, and required larger annual instalments of the debt to be paid in for investment than were prescribed by the act of 1852.

In pursuance of the scheme indicated by the act of 1852, and dealing with the subject in her own right, also in perfect accord with that scheme, the State subsequently accepted from the R. R. Companies, or their friends, in discharge of her claim against them, her own bonds to the full amount of the loan she had made, and interest upon it. This was but carrying out the plan originally proposed by the act of 1852, under which she loaned her bonds; for it was then contemplated that

the debt to the State should be paid by the delivery to her of her own bonds of any issue, to an amount equivalent to the amount of her loan. The proceeds of the sinking fund provided by the act of 1852, were to be applied to the purchase of her bonds, which should be returned to her. The State has not lost a dollar in her dealings with the appellee in this case; in fact, the appellee has done precisely what was intended should be done in the discharge of this debt, as indicated by the act of 1852, only instead of the discharge being effected at the times provided by that act, it was effected under the terms of the acts of 1869 and 1870, which was passed in pursuance of the power reserved to the State by section 12 of the act of 1852.

These suggestions, and the remarks heretofore made, in our examination of the nature and details of the act of 1852, and in supplement thereto, show how widely different the transactions and legislation in this case are from the transactions and legislation exhibited in the case from South Carolina, Hand vs. R. R. Company, and from Florida R. R. Company vs. Schutte.

The case of Tompkins vs. Little Rock Railway Co. (U. S. Circuit Court, Arkansas), 18 Fed. Rep.,344, is also cited by the appellant.

In that case the State loaned her bonds to the Railway Company; the State was the only party to the bond. The bond on its face referred to the act of the Legislature under which it was issued. That act contained the provision that an annual tax should be imposed upon the several Railway Companies receiving State bonds equal to the annual amount of interest upon the State bonds issued to it, and after five years an additional special tax should be imposed of 2 1–2 per cent. upon the whole amount of State aid granted to the Company, payable in money

or in State bonds, and to continue till the amount of bonds issued to such Company, with interest thereon, shall have been paid by said Company."

The State having failed to pay interest on these bonds, the holder attempted to collect the bonds from the R. R. Company, on the notion that this reserved power in the State by taxation to enforce means for the payment of the bonds, evidenced a lien on the railroad property for the payment of the bonds to their holder.

The Circuit Justice repudiated the notion of such right in the bondholder, or that this reservation of power to coerce payment by taxation, operated any lien upon the railroad property for payment of the bonds, of which the holder could avail himself.

The enforcement of these annual payments by the R. R. Company was secured to the State by a right of sequestration of the Railroad property and its income till the amount of annual payment so provided for was fully made. A remedy strikingly similar to that reserved by the State of Tennessee for similar default by its R. R. Companies, under the act of 1852.

The chief, if not the only difference, being that in the Arkansas statute, the annual payments are spoken of as a tax imposed by the State, while in the Tennessee statute, they are not called a tax, though as in the Arkansas case, these annual payments are part of the conditions attaching to the receipt of the State bonds by the R. R. Company. In effect the provisions as to annual payments into the State Treasury, are the same. The Court held this provision created no lien in favor of the holder of the State bonds upon the property of the Company to whom they were loaned, and who disposed of them in the market.

This is the whole effect of the decision in this case—that on this act, the bondholder had no claim upon the property of the R. R. Company, which he could enforce in payment of the State bonds. His claim was wholly against the State on the bonds issued by her. The Court also refers to the cases of Hand and Schutte above remarked upon, and finds nothing in them to change the opinion it had expressed upon the provisions of the statute of Arkansas.

As to the case of Hand, the Court finds that the language used did create a lien of which the bondholder could avail himself, for it was so expressly declared that the lien was to the State of South Carolina for the payment by said Company of the bonds.

It is difficult, perhaps, to see how any other opinion could be formed in the case of Hand. The R. R. Company was the debtor, primary, and at all times—it issued the bonds, it was its duty to pay them; the liability of the State was that of guarantor, secondary to the liability of the Company; any security it received from the Company could only be for payment of the Company's bonds, for the payment by the Company of its own debt was its duty, of which the State could not in any manner relieve it; and the discharge of its duty was a discharge of the responsibility of the State. The State could take no security from the R. R. Company that would not enure to the benefit of the holder of the bonds of the latter. As heretofore remarked and as shown by the remarks of the Court in the Arkansas case, the case of Hand furnishes no analogy to the case under discussion, much less an authority in support of the position of the appellants in this case.

The view of the Florida case, taken by the learned Judge in the Arkansas case, seems to be the same heretofore presented.

The express language that was employed in that case in the Governor's certificate upon the bonds, which become in fact, the language of the R. R. Company in its negotiation of the bond, declared that the security received by the State was in trust for the holders of the bonds of the State. These last were in fact, merely substitutes for the R. R. bonds, which were not negotiable, and were held by the State as evidence of the debt described in the statute creating the lien on the Company's property. While the form only was different, the transaction in the Florida case, as between all parties, State, Railroad Company and bondholder, was in effect the same as in the South Carolina case. The State in each case was the guarantor of the debt of the R. R. Company; in other words, was its surety, and received from the principal debtor securities for the payment of the principal debt, good faith and common honesty required that its action in this respect, should be not for itself alone, but in trust for the holders of the principal debt.

It is conceived the case now before the Court is totally different from those two cases, and is governed by the considerations suggested in the Arkansas case. The appellants hold simply the bonds of the State, with no other party to them than the State, and this is all the security they ever contracted for. They have and pretend to have no debt against the R. R. Company, but they assert that they have a lien upon property, in security for the payment of the bonds of the State. Now, after years of silence, wherein they set up no such claim, it behooves them to make a clear case in support of their claim.

It is submitted that appellants have utterly failed in the case they attempt to make, while in good faith and in accordance with the practical construction of the act of 1852, and of the

scheme therein proposed, and the plain meaning of its language, this appellee has fully paid to the State in the manner designated by the statute, all it ever assumed to pay, and all that in equity and good conscience it should be called on to pay.

X.

The considerations herein presented have received confirmation by a decision of the Supreme Court of the United States—in addition to the judgment of Mr. Justice Bradley, 2 Woods' Rep., 387.

In the case of Chamberlain vs. St. Paul, &c., R. R. Co., it appeared that Chamberlain was the holder of a large amount of bonds issued by the State of Minnesota in 1859 to a Railroad Company of that State. That corporation had received from the State a grant of lands, which the State had received from the United States (11 U. S. Stat., 195) to aid in the construction of a Railroad. The bonds of the State were issued to the Railroad Company, payable to its order, in installments as sections of the road were completed. The Company provided security for payment of the interest on the bonds by a pledge of the net profits of its road. It provided security to the State against loss on the bonds by conveyance to the State of two hundred and forty sections of land, and by delivering to the State a corresponding amount of its own bonds providing for payment of interest sixty days in anticipation of the time fixed for payment of interest upon the State bonds, with a deed of trust upon its road, land and franchises. The Company did not complete its road, and made default in payment of interest upon the State bonds and upon its own mortgage bonds. The State foreclosed upon its securities and purchased in the road, lands and franchises, covered by the Company's conveyances to it. After-

wards another Railroad Company was organized, to which the State granted, subject to certain conditions, all the rights, property and franchises of the original Company which the State had acquired, free from all claims and liens. This new Company complied with the conditions of its contract with the State, and received conveyances as stipulated.

The bonds issued by the State to the first Railroad Company were never paid, and were in fact repudiated by the State.

The complainant sought by his bill to subject the 240 sections of land, which the original Company had conveyed to the State for its indemnity, and which Congress had granted to the State, to aid in construction of the Railroad, to the payment of the bonds of the State, which it had issued to the original Company, and which had been endorsed to him by the President of the Railroad Company, for work, &c., he had furnished in preparing the road-bed of the original Railroad Company.

The theory of the complainant in that case, as it is in the case we are discussing, was that notwithstanding the form of the contract, the Railroad Company was the principal debtor, and the State its surety: that as the creditor to be paid, he was entitled to the application of this land, as a portion of the security the State had received for the payment of his bond, and that his right was not changed by the foreclosure and purchase by the State.

The Court, of course, admitted the general doctrine of Equity, as to the right of the creditor to the benefit of the securities furnished by the debtor to his surety—so do we. The Court held, on the facts, (as we insist upon the facts in our case) that the deed and mortgage to the State was not intended to create a trust in favor of the holders of the State bonds. The

Court held upon the form of the contract, (as we insist upon the form of the contract here) that the State was primarly liable to the bondholders—and it was only as between her and the Railroad Company, that the relation of principal and surety existed. In that case, the bonds of the State were endorsed to the holder by the President, and not by act of the Company. The Court expressed grave doubts, whether in that case, the holders of the bonds could call upon the Company in any event. There is no room for doubt in our case, for there is not the semblance of an endorsement of the State bonds, by either the Railroad Company or by any of its officers or agents.

The Court held that whatever right complainant had in that case, was the creature of Equity—an inference of natural justice from the relation of the parties. But when the rights of parties are defined by their contract, there is no room for inference. The contract makes the law; and in that case the contract did not make a lien, which attached to and followed the property. Whatever his right was. it was a right to be enforced, if at all, only by a Court of Chancery, *against the surety.* "But the State, being (on complainant's own theory) the surety, *it could not be enforced at all,* and not being a specific lien upon the property, cannot be enforced against the State grantees."

The remarks of the Court upon the laches of the complainant in that case, are applicable in our case.

In Murdock vs. Woodson, 2 Dill. R., 188, the State of Missouri loaned its bonds to a Railroad Company, and took from it a mortgage lien upon its Railroad as indemnity for the State bonds the Company had received. The bonds were payable to the order of the Company. By the act loaning the bonds, the Company was to make provision for the punctual payment of the

interest and principal of the bonds so issued to it by the State, *so as to exonerate the State from advances of money for that purpose;* and the acceptance of the bonds by the Company "should become and be to all intents and purposes, a mortgage of the road, &c., to the people of the State, for securing the payment of the principal and interest of the sums of money, for which such bonds shall from time to time, be issued and accepted as aforesaid." Subsequently the State, by legislative enactment, accepted from the Company a large sum of money, but less than the bonds and interest, and discharged the Company from the lien, and all responsibility for the bonds. The State afterwards repudiated this settlement, and undertook to sell the property under the original lien. The notion was that the State took that original lien in trust for the holders of the bonds she had first issued to the Company, and that the release and discharge of the Railroad Company by the State was invalid and illegal. The question was thus presented upon the claim of the State itself for the bondholders. In the Chamberlain case (2 Otto R.) the claim was made by the bondholders in their own behalf. The result in both cases was the same. The entire right of disposition was held to belong to the State. Judge Dillon, p. 206, to this claim of right in the bondholders, says, "I am inclined to think, the form of the transaction indicates the intention of the parties. The State issued its bonds, and these were negotiated and taken upon the State's faith and credit, without any accompanying security. To *indemnify itself*, the State provided and received a mortgage upon the road of the Company, and a pledge of its net tolls and income."

The release by the State of its lien, created under the Statute, by the receipt on the part of the Company of the bonds of the

State, was sustained by the Court. This decision of the Circuit Court was affirmed by the Supreme Court, U. S., 22 Wall. Reports, 351.

These decisions accord with the decision of Mr. Justice Bradley, in 2 Wood's Rep., 385, supra.

These decisions all proceed precisely upon the theory on which the Acts of 1869 and 1870 were enacted by the State of Tennessee, and on which the transaction between that State and Messrs. Duncan, Iselin and Wilson were consumated, and on which the Mobile and Ohio Railroad Company executed its declaration and deed of trust to these gentlemen, July 1, 1871, as its agents, and the trustees for the holders of the bonds it then authorized to be issued by the Railroad Company for the purposes of that transaction.

It is, therefore, respectfully submitted that complainant cannot sustain his bill—

1st. Because of the absence of Messrs. Duncan, Iselin and Wilson, as parties, who are necessary to the adjudication of the rights claimed by the parties as presented by the pleadings;

2d. Because of the absence of the State of Tennessee as a party to the Bill—that said State is a necessary party to the adjudication of the rights claimed by the plaintiff, the same rights being shewn by the pleadings to be also claimed by other parties by assignment from the State for a valuable consideration;

3d. Because the State, which is a necessary party, cannot be brought before the Court, not being amenable to the jurisdiction of any Court, and therefore the subject of this controversy, which grows out of the action of the State as a sovereign, is not a subject of judicial cognizance by the Courts;

4th. Because the relationship of the State to the transaction

in its acceptance and in its execution through all its various forms, being that of a sovereign, with the rights and exemptions of a sovereign, of itself excludes from the case the notion of a trust in her, to be enforced against her by the Courts, and in like manner excludes the notion of securities deposited with her, charged with a lien which attached to and followed the property so pledged to her in favor of the holders of her bonds;

5th. Because the features of the transaction, as evidenced by the statutes in relation to her loans to these aided Companies negative any presumtion of suretyship by the State for the aided Companies. They present the case of distinct contracts—one between the State and the bond-holder as the creditor of the State; the other between the aided Companies and the State, wherein the Companies became the debtors, and furnished to her security for the protection of their debt to her.

The defence here presented, does not stand upon any doctrine of subrogation in favor of the parties who dealt with the State under the Acts of 1869 and 1870. They stand upon positive assignment to them by the State as creditor, with the assent of the debtor of the creditors debt and security. The State had a debt against the corporation; if so, it could assign it. It is not the case of a volunteer praying the debt of a third party, and then seeking to enforce it for his own benefit: but if it were, the debtor has assented to the transfer of the security. It is the case of an assignment for value by a creditor, with the approval of the debtor.

An absolute debt was due by the State to its bond-holder; an equally unconditioned debt was due by the Railroad Company to the State. The debt of the State is on its bonds. The corporation did not endorse, or in any manner guarantee these

bonds; it is in no manner a party to them. At one time it held the bonds of the State as the owner, and became such by delivery to it from the State, on a contract it made with the State, and with no other party but the State. Its contract with the State was perfect when it received the bonds; its use of the bonds did not change the contract, or add to or lesson the power of the State. It afterwards sold the bonds, but made no contract in relation to them, except the implied stipulation that they were genuine. When it parted with the bonds, a liability thereon arose from the State to the new holder; but no liability was thereby imposed upon the Railroad Company to the new holder, and its relation to the State remained as before—neither more, nor less.

By receiving the bonds from the State, with power to use them, it became debtor to the State: it received the bonds as money, the same in amount as expressed on their face: and promised to pay that amount to the State with a statute mortgage upon its property and franchises for its payment, not to the bond-holder, but to the State; not at the place where the bondholder was authorized to collect the principal of his bond, but at the Treasury of the State: not at the time when the bond matured, but long in advance by annual payments, and they not necessarily in money, but in bonds of the State, it might be either of bonds it had received from the State, or in other bonds of the State.

During the running of its debt to the State, the Railroad Company assumed to pay interest upon it, to the State. These payments were not required to be on the coupons attached to the bonds issued by the State, nor in their payment and satisfaction —not to be made at the time or place described in said coupons, nor at the rate named in the bond, nor to the holder of the cou-

pons. The Railroad Company undertook nothing in relation to the interest coupons or their holder, though it had the privilege to provide for their payment, in anticipation of their maturity. It assumed by its contract to pay at the Bank of Tennessee, at Nashville, fifteen days before the interest coupons upon the bonds matured, an amount of money equal to the sum named in the maturing coupon, with exchange on the place of payment named in the coupon and commissions upon the same.

The contract between the Railroad Company and the State, is thus a matter entirely distinct and different from the contract evidenced by the bond. His State bonds are the only evidence of right the complainant holds, separate from the acts of 1852, which form the contract between the State and the Railroad Companies, herein commented on. It necessarily follows, there was no contract of security to the State, or for its indemnification by the Railroad Company, to which the bond-holder can attach any claim or equity, to impair the rightful authority of the State to deal with its debtor, and its securities as it saw fit, even to the release of all claims it had upon the debtor.

The character of the parties, and the subsequent action of the State in its transactions with Messrs. Duncan, Iselin and Wilson, only add force to the argument. How can the Court deal with the sovereignty of the country, when it declares its will as to the mode in which it will contract with its subjects? How add to the terms of its contracts? How attach an incident to its contract, which is inconsistent with the characteristics declared by the contract? It may be admitted a State may so deal with parties, as to authorize a presumption, that it accepts the ordinary incidents of suretyship. The State, however, has authority to change all such incidents by its law-making power. When it de-

clares its own position and rights specifically in its statute, whereby it proposes to deal with its subjects, or citizens, there is no room for presumption, and the Court takes the law of the case, not by reasoning from general doctrines, but as declared by the power, which announces the rule that is to govern.

When the State by its statute declares, that it takes the lien to itself, and at the same time declares, that it reserves to itself the right to enact by its Legislature all *such laws*, may be deemed necessary for its security, and proceeding in its character of sovereign, provides remedies and modes of proceeding, consistent only with such sovereign authority, on what principle or by what authority, can any holder of the bonds of the State claim that the State is a surety merely, and its liens are in trust for him?

It is respectfully submitted, that in no light in which this legislation can be regarded, can it be held that this plaintiff has any standing to interfere with the settlement the State made in 1872, of its claim against the Mobile and Ohio Railroad Company, or to assert a claim against the property of that corporation.

P. HAMILTON,
of Counsel for Appellee.

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No. 165

SUPREME COURT U. S.
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114-663

Supreme Court of the U. S.

No. 482.

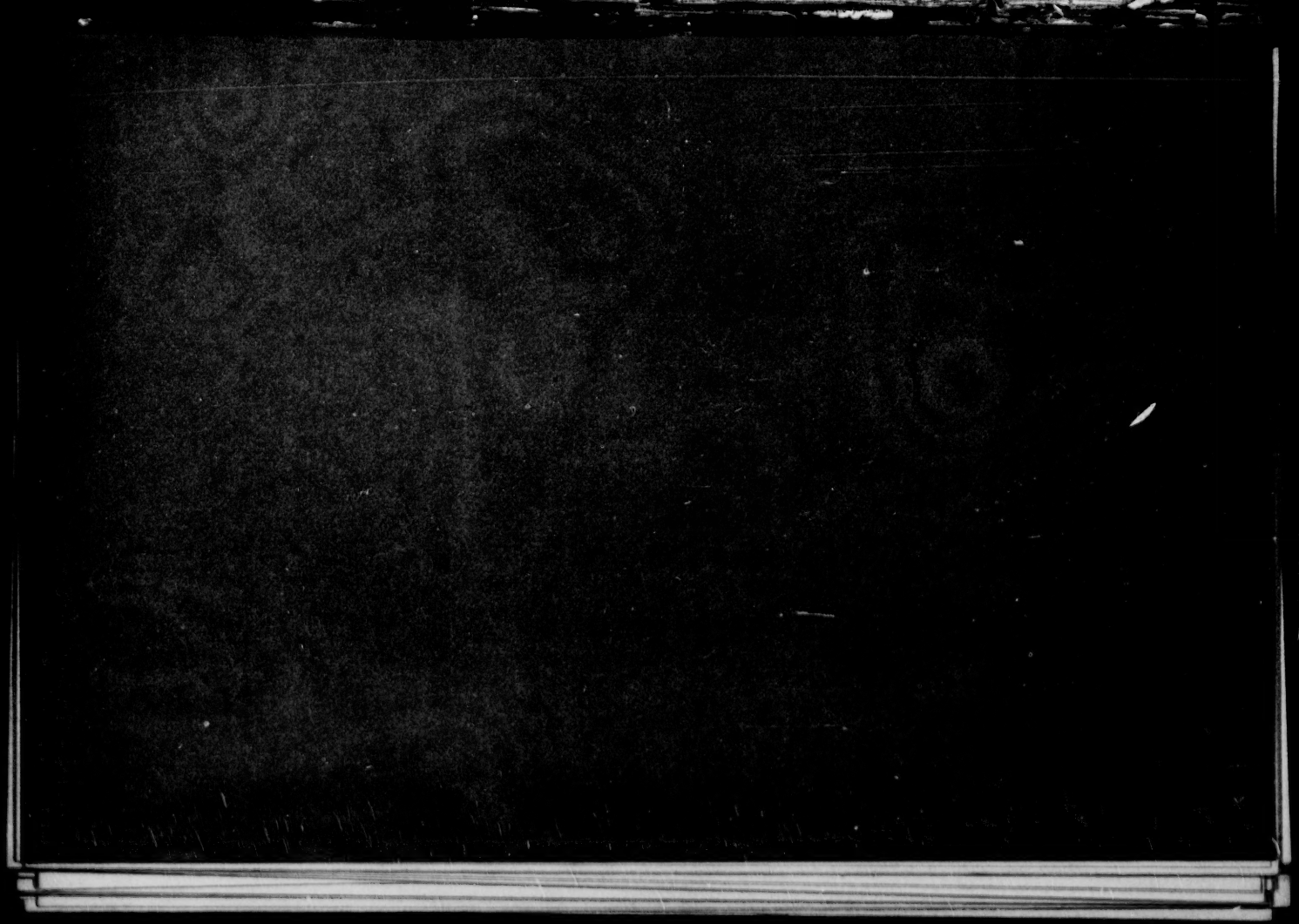
CALVIN EMORY STEVENS, ET AL.,

vs.

MOBILE & OHIO RAILROAD COMPANY, ET AL.

JOHN A. CAMPBELL,
For Appellee.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.



Supreme Court of the United States.

No. 482.

CALVIN EMORY STEVENS, ET AL.,

vs.

MOBILE & OHIO RAILROAD COMPANY, ET AL.

A STATEMENT OF THIS CASE.

I.

The Mobile & Ohio Railroad Company was incorporated in Alabama in 1848, to construct a railroad through Alabama, Mississippi, Tennessee, and Kentucky, to a point near Cairo on the Ohio River. The corporation had, from all of the States, the franchises necessary. Congress granted public lands to assist in 1850. The railroad was completed to Columbus, Kentucky, in 1861.

II.

Tennessee, on the 11th of February, 1852, adopted a legislative act "To establish a system of internal improvements in this State." This act contains twenty sections, and before the system was subverted, there had been enlisted about thirty railroad corporations as component parts, and had received loans of bonds from the State. The acts of legislature concerning it form a volume. These corporations undertook to construct railroads within the State, and during the progress obtained the aid of the State. The act

of 1852 defined the mode of procedure for obtaining this aid; and this act and numerous amendatory and supplementary acts of the legislature disclose the plan which was projected to connect the State with the railroad systems of the States adjoining. The initiatory act delineates in nine sections the mode of assisting one corporation—the East Tennessee and Virginia Railroad Company.

In the tenth section the same privileges and the same restrictions are applied to twelve other corporations upon compliance with the conditions. The three divisions of the State, East, Middle, and West, are promised material aid, and all of their corporations are subjected to the same treatment. The aggregate sum of issues of bonds before the summer of 1861, was $13,739,000, and before the extirpation of the system which connected the State with the railroads, this sum of bonds was increased about $10,683,000. The failure consequent, principally by the existence of civil war, involved great financial embarrassments, and ruin to the State.

III.

The corporations, under the act of 1852, were to prepare a roadbed complete for thirty miles, suitable for the reception of iron rails, which was to be free from any incumbrance. The Governor, upon proof of this fact, and of ability of the company, might issue coupon bonds of the State of Tennessee, to that company, not to exceed $8,000 per mile. The bonds were to bear interest at six per cent., payable semi-annually, and to be redeemable in not less than thirty nor more than forty years from date, at some place in the United States. The place of payment is the city of New York.

IV.

These bonds could not be sold for less than their par value; the money could not be applied to any other purpose than that specified in the act. The State might oversee the sale of the bonds,

and the expenditure on the road of the money received; and penalties were incurred by infractions of this act.

A corresponding amount of bonds might be issued whenever any succeeding section of the railroad was properly prepared, and completed. The sum to be issued was, afterward, increased to $10,000 per mile; and there were instances of special appropriations for bridges to some of the companies; and appropriations were made afterwards upon the completion of ten miles instead of thirty. The leading provisions of the act continued in force with some changes. The sections of the act relative to the security of the State are the third and fourth and twelfth sections. The third section, declares that as soon as the bonds shall be issued on account of the first completed section of the road, they shall *constitute a lien upon that section*, including the road bed, the stock subscribed for in the company; and upon the equipments and material when delivered to the company. "*And the State of Tennessee upon the issuance of the bonds and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due.*"

V.

The fourth section refers to the issue of the bonds to the companies, as sections other than the first shall be ready. It concludes: "*And when the whole of said road shall be completed, the State shall be invested with a lien, without deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chains, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business, and all depots, and depot stations, for* the payment of all said bonds issued to the said company as provided in this act, and for the *interest accruing on said bonds.* The section concludes that: "After the Governor shall have issued bonds for the first section of the road *it shall not be*

lawful for said company to give, *create,* or *convey* to any *person* or *body corporate* whatsoever, any *lien, incumbrance* or *mortgage* of any *kind* which shall have *priority* over or *come in conflict with the lien of the State herein secured;* and any such lien, incumbrance or mortgage shall be *null* and *void* against said lien or mortgage *of the State, and the said lien or mortgage of the State shall have priority over all other claims* existing or to exist against such company.

Act of 1852, sections 2, 3, 4, 12.

In this connection it will be proper to consider the 12th section of this act. That section expressly reserves in favor of the State of Tennessee the *right* to *enact by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State,* and to secure the State against any loss in consequence of the *issuance of said bonds under the provisions of this act.* But in such a manner as not to impair the vested rights of the stockholders of the said companies.

VI.

The act contains requirements for reports to the Governor relative to the condition of the railroads from time to time; of the financial condition of the companies; of the state of traffic and travel; of the receipts and expenditures. The guage of the railroads, their relations with one another as to co-operation and connection, the fidelity of the officers, and the manner of the performance of duties, are matters of regulation and for penal enactments.

VII.

The bonds issued by the State of Tennessee under the acts for internal improvements are all of the same style and were printed from the same plate, and there was no sensible difference between them, and the issues for the Turnpike roads, or the bonds for building the Capitol, or the purchase of the Hermitage. In all, the State acknowledges to owe to ———, or order, one thousand

dollars, lawful money of the United States, which the State promises to pay in the city of New York, on the first of January of a designated year, with interest at the rate of six per cent., payable semi-annually upon the presentation of the coupons attached. "*For the performance of which the faith of the State of Tennessee is hereby irrevocably pledged, as this bond is issued in pursuance and under the provisions of* an act of the General Assembly of said State passed at its session of 1851-2. The seal of the State and signatures of the Governor and Secretary of State are attached.

VIII.

The coupons are drafts of the Comptroller upon the Treasurer for the payment to the *bearer* of thirty dollars, in the city of New York, on the day specified—being the semi-annual interest falling due on bond No. —. The blank on the face of the bond for a payee was not filled. The name of a railroad company does not appear in any place. The State did not take from the railroad company any deed, note, covenant or acknowledgment of debt or duty. Merely a receipt from some agent that he had received the bonds described in the receipt.

Nor did the company give to the purchaser any obligation, or agreement, or notice of any connection with the bonds.

The bonds were sold without any reservation of a recourse upon the company or notice of her connection with the bonds. The interest paid by the companies, when paid, was in a gross sum, and the interest received was mingled with payments made by other companies and the State, when failing to pay interest, suspended payment upon the instalments on all of her bonds. No discrimination was made by the State in reference to her payment of bonds by any fact connected with their issue to one or another company.

In one of the cases before the Court, the State had collected, through a receiver appointed by the Governor, interest in arrear demanded of a company, which interest was paid into the Treasury,

and had not been paid to the holders of the bonds delivered to that company. No relation or connection of holders of bonds to the specific sums paid by corporations into the State Treasury under the improvement acts, was, at any time, promoted or recognized. The corporations were charged as debtors to the State for bonds and interest on bonds, and credited with payments. No payments were made by corporations to the bondholders at any time, and no claims preferred by bondholders against the corporations. They were strangers without any occasion for intercourse.

IX.

The railway corporations were required to deposit in the Bank of Tennessee at least fifteen days before the interest became due upon the bonds issued a sum sufficient to pay the interest, including exchange and necessary commissions.

In case of failure the Governor should appoint a person, at the expense of the company *to take possession and control* the railroad and all the assets thereof and *manage* the same and receive the rents, issues and profits. He was to pay over the same, under the directions of the Governor towards the liquidation of such unpaid interest. The Governor could enforce the delivery of the road and property to the receiver, through the Sheriffs of the counties.

The Comptroller was to settle the accounts of the receiver and the balance shall be deposited in the Treasury of the State. The Comptroller was required to draw from the Treasury the sum necessary to meet the interest on such bonds as may not have been provided for by the company. Under an act passed in 1867, upon the failure to pay interest for two years, the Governor, Comptroller and President of the Bank were required to direct the filing of a bill in the name of the State in the Court of Chancery, and to have a decree for the sale of the property to indemnify the State from loss. At a later date Commissioners were appointed for the purpose of making sales of the railroads on which the sums for

the payment of interest and sinking fund had not been duly paid. The Commissioners did not execute their powers from the defect in the act to supply the requisite power determine the questions which were presented and because a judicial proceeding was a better mode and recommended such a proceeding.

Ch. 17, Acts 1867–8; Ch. 76, Acts 1870; Ch. 23, Decr. 1870.

X.

Sinking Fund.

Provision for a sinking fund is made in the seventh section of act of 1852. The companies were to set apart annually one per cent. of the amount of the bonds five years after the completion of their roads. This sum was to be employed in the purchase of bonds of Tennessee, to be assigned to the Governor. The bonds thus delivered were to be a credit on the bonds issued to the company, as between the State and the company.

These bonds and the interest thereon were to be held as a sinking fund for the payment of the bonds issued to the company. The bonds issued to the company when purchased were to be cancelled.

The failure to pay the sinking fund subjected the company to seizure and management as in case of failure to pay interest. In February, 1856, *before any issue of bonds to the Mobile & Ohio Railroad Company* the sinking fund was raised to *two* per cent. to be collected semi-annually after five years from the *date* of the bonds issued to any company. Commissioners were to receive the money and to invest in any bonds of a like character to those issued to the company; the sum received were to be a credit to the company. This sum could be collected by a seizure of the railroad and a management by a receiver. The bonds issued to the Mobile & Ohio Railroad Company had about thirty-five years to run. A sinking fund at *one* per cent. would pay the debt in thirty-three and one-sixth years.

In an act passed 20th March, 1860, the payments for a sinking fund were to be passed directly to the credit of the corporation making the payment, and was to *release* the corporation from so much debt due to the State, because of the loan of the bonds. The sinking fund is increased to two and one half per cent. annually, to be paid semi-annually to the Governor, Comptroller and President of the State bank in cash, or in State bonds of the like character of those issued. The account was to be kept by the Comptroller, who charged the corporation with the amount of the bonds sold, and this account was credited with the payment made as a sinking fund. Acts 1859–60, Ch. 93. This sinking fund was regarded as a debt and upon a failure to make the payment the State might institute a suit and have the railroad property seized according to the fifth section of the act. In a later act of 1867, (Laws of Tenn., p. 16.) a sale might be made, when the default in the payment for interest continued two years, the officers of the State were required to retain of the proceeds of the sale the amounts loaned to the State, to the said companies, and interest due on the same.

XI.

The Connection of the Mobile & Ohio Railroad Company with the State of Tennessee under these Acts.

This corporation is introduced as a corporation to receive the benefits of the act of 1852, in the 10th section. She did not finish a section of thirty miles in four years and lost the privilege under the 20th section. An act was passed in 1855 to reinstate her; she received 1,296 bonds, $10,000 per mile for a railroad 118 miles long, and a special appropriation, besides, for bridges. Her first receipt was 17th of June, 1856, other receipts in 1857, 1859, and 250 bonds in July and September of 1860, and the last instalment of 172 bonds on the 11th of June, 1861. The bonds were of $1,000 each, payable to ——— or order, and no recourse

upon the corporation was reserved at the sale. There is no liability for the bonds on the part of the corporation. The bonds are bills single of the State.

Otis vs. Cullum, 2 Otto, 448; Orleans vs. Platt, 99 U. S., 676; Byles on Bills, 115, 291; Story on Bills, sec. 215.

The delivery of the bonds to the Mobile & Ohio Railroad Company commenced 17th June, 1856, and terminated 11th June, 1861, when the railroad in that State, and in Kentucky, was finished. The lien invested in the State of Tennessee upon the completion of the railroad as described in the fourth section of the act of 1852, became operative at that date, and in which the antecedent liens, reserved on sections as they were constructed, were merged. Upon the bonds issued in 1856 the liability for the sinking fund under the act of 1856 before referred to became payable. The statute passed in 1860 was now in operation, wherein there was a clear statement of the character of the contract made, and some potent measures to insure a settlement of the obligations reduced to a form for execution.

At this date of June, 1861, the State of Tennessee had performed all of her agreement with this corporation. She had, as the work of construction was performed by the corporation in the completion of one section after another, delivered to the corporation the coupon bonds of the State, and on the 11th June, 1861, delivered the last instalment. The bonds were not delivered as a donation, a contribution, a bonification, nor as a partner, nor as a stockholder—they were a loan.

XII.

The Civil War commenced in June, 1861. The railroads throughout the State of Tennessee were immediately occupied by the military authorities and so continued until the autumn of 1865. During the intervening years legislation was silent. From the year 1865 until 1872 the questions of the greatest interest in the

political history of the State are those which relate to the railroads. The system of the State, as matter of fact, had been demolished by the casualties of war. Bridges, superstructure, equipments, station houses, depots—the product of the advances of the State, were for the most part destroyed. It was particularly so with the Mobile and Ohio Railroad Company. The reports of the Quartermaster of an inventory of railroad property captured and returned to the company, consisted only of 4 locomotive engines, 2 engines with tender, 1 clock regulator, 4 flat cars. Her purchases of railroad equipments from the Quartermaster's department of the division of Tennessee in the autumn of 1865, at the sales of such property, was $420,143.70. This corporation did not borrow any of what are termed, in the plaintiff's brief, "Postbellum bonds," issued by the provisional legislatures after 1865.

The statutes of Tennessee in this period show an anxious purpose to have an adjustment of the disordered finances of the State, and a renovation of some portion of her system of internal improvements.

The enactments relative to the collection of interest from the sales of the railroads belonging to insolvent companies; the enlargement of the demand for a sinking fund to four per cent. and the appoint of commissioners to make a sale of the road and the requirements of suits were measures to compel a liquidation. The corporations are called delinquent corporations and the measures express severity. Two acts passed, one 1869 and one in 1870, present measures for the liquidation of the public debt; the payment of the public debt by the railway corporations. The debt to be paid is the debt due by those corporations to the State. The plan of the State is not compulsory and was objected to for that reason, by members of the legislature when the acts were under discussion.

1. The State proposed that the corporations should as early as practicable pay the *principal* of their indebtedness to the State in the bonds of the State bearing six per cent. interest without regard to series or number; and the payment, to the extent made, should be a full and perfect discharge of the lien which the State holds

upon its property whether they be of the same bonds or the same series. There were modes proposed for the debtor corporation to issue their own bonds and to attach the State's lien thereto; and to give to those bonds the security of the lien which had been invested in the State; the purpose seemed to be to strengthen the corporation and to secure to them the property by enabling them to appropriate the first mortgage lien as the security.

2. The State proposed that any other corporation, or any persons, might pay the debt to the State in the manner above proposed, with the consent of the debtor railway corporation and to obtain a subrogation of the lien which the State had to themselves, thus the corporation would be a debtor to a new creditor, and the lien of the State will have passed by subrogation, or substitution, as well as her own debt.

The acts of the Legislature arrange for the payment of the arrearages of interest by the use of coupons of interest which were overdue. These, in form, are warrants on the Treasury, and payable on presentation by the Treasurer.

3. The Mobile & Ohio Railroad Company consented that Duncan, Iselin and Wilson should make the settlement conformably to these acts. The consent of the company was filed with the Treasurer of the State. The Comptroller produced his account for the amount of the bonds, and the arrearages of interest, and these were paid into the hands of the fiscal officers of Tennessee, and the assignment and transfer authorized by those statutes were duly executed. The debt paid to the State consisted of the amount of 1,296 bonds; and arrearages of interest, $388,800, paid off in coupons. Since this settlement in January, 1872, none of the acts relative to the payment of interest or of sinking fund have had any relevancy to this corporation. The State has made no demand for debt or duty under those acts. She is satisfied. The debt to her is discharged.

Code of Tenn., 1185.

Acts of Tenn., 1868–9, ch. 38.

Acts of Tenn., 1869–70, ch. 47.

XIII.

Pleadings and Evidence.

The bill was filed in January 1879. Their evidence consists of bonds which had originally been issued to the Mobile & Ohio Railroad Company, and the coupons of interest on the bonds are unpaid. The bonds and coupons correspond with all other bonds of the series payable in 1892 or 1898. They contain no endorsement of guaranty and no demand upon this corporation for payment. The claim is that no valid payment could be made to Tennessee that did not place the bonds issued to the company in her possession. Tennessee was a simple agent for collection of the particular bonds she had issued and the lien of the State on the company had passed from Tennessee and was enjoyed by the holders of that precise issue of bonds.

The prayer of the bill is, that the Court shall declare, that there was now existing in favor of the plaintiffs — the holders of the bonds of Tennessee and the coupons thereon—upon the railroad of this defendant, a first mortgage lien prior to any other.

That this lien be enforced against the defendant and that the income be applied to the payment of the interest which has accrued or shall accrue.

That the property be seized and that a receiver may be appointed to be administered according to the liens and trusts, &c.

The answer of the defendant controverts the averments of the bill in respect to the responsibilities of the corporation in any form, or for any purpose to the plaintiffs, as holders of bonds of the State of Tennessee, because of the default in the payment of the instalments of interest thereon, and disclaims a knowledge, and denies the validity, of any claim, or pretension of these plaintiffs.

2. The answer discloses the settlement which took place in the year 1871–2 between the State of Tennessee under laws passed by her legislature in the years 1869 and 1870, whereby the State acknowledged full satisfaction of the debt of the Mobile & Ohio

Railroad Company, and the subrogation of that lien to Duncan, Iselin and Wilson, in whom it is now vested, together with the debt due from this defendant before that time to the State of Tennessee. The fact is brought to the knowledge of the Court with suitable suggestions, that the State of Tennessee and the Trustees, Duncan, Iselin and Wilson are necessary parties to the suit, and that the cause is defective without them and cannot be entertained by the Court.

3. That the State of Tennessee is the only obligor on the bonds which the plaintiffs hold, and on the coupons of interest thereon unpaid. The State of Tennessee was *invested with the* lien upon the railroad property of the Mobile & Ohio Railroad Company in the State of Tenessee, and the only person or party who has exercised or asserted any proprietory right thereto, and the only person or party acknowledged or organized as having any such lien; and whatever right the State of Tennessee had is now vested in the said parties, Duncan, Iselin and Wilson. These are necessary parties in the cause.

4. The Mobile & Ohio Railroad Company of Tennessee in reference to the said railroad was a subject to the laws of the State of Tennessee; and the State of Tennessee had full title and authority to make laws to promote the interest of the State of Tennessee; and to secure her from damage because of the loan of her bonds under the act of February 11, 1852, with the consent of all persons who were parties to the subject-matter of these laws; wherein the interests of the State as a lender of bonds were in any manner involved. That the settlement made in 1871–2, as pleaded was comprehended in the scope of her authority and is conclusive upon all persons.

5. The plaintiffs in this case were bound to take notice of the Statutes of Tennessee, and the action upon them and of their rights and interests. That the absence of all objection, opposition and complaint at the time of the enactment of the laws, or of the settlements made, and the long acquiescence estops opposition at this

date. The State during this whole period in her capacity as a sovereign, and as administrator of the laws and regulations, has habitually acted as a *negotiorum gester* with full powers reserved, and was competent to do all she has done.

Effect of the Evidence—As to the Subject of Lien and the use sought to be made of it.

The Mobile & Ohio Railroad Company was completed in 1861. Under the 4th section of the Act of 1852, this result forms an era in the relations of the State and that corporation.

The section enacts: "And when the whole of said road shall be completed the State of Tennessee, shall be invested *with a lien, without a deed from the company,* upon the entire railroad, including the stock, right of way, grading, bridging, masonry, iron rails, spikes, chains and the whole superstructure and equipments, and all the property owned by the company, as incident to, or necessary for its business; and all depots and depot stations for the payment of all said bonds issued to the said company, as provided in this act and for the interest accruing on said bonds.

It is manifest by a slight examination that the lien spoken of in the *third section* was temporary and designed to serve a transitory aim, and was to be absorbed and merged into the lien declared at the end of the fourth section and to cover the *entire railroad property.* The section continues and concludes: "After the Governor shall have issued bonds for the first section of the road, it shall not be lawful for the company to give, create, or convey to any person or persons, any lien, encumbrance, mortgage of any kind which shall have priority over, or come in conflict with the *lien of the State herein secured;* and any such lien, incumbrance or mortgage, shall be *null and void* as against said lien or mortgage of this State; and the said lien or mortgage, shall have priority over *all other claims existing or to exist against said company.*

I.

The prayer of the bill is that the lien of the State may be established above all other claims, as constituting the first and paramount incumbrance on said property and rights.

But the State of Tennessee does not make this prayer, nor concur with those who do make it in this suit; she is not a party. The State of Tennesse was *invested* with the prior and paramount lien, by an act of her General Assembly, with the consent of the Mobile & Ohio Railroad Company. Nor could that lien be alienated without the authority of the General Assembly. The company consented that the General Assembly should pass all such laws as she might deem necessary for the protection of the interest of the State and to save her from harm or loss. She consented when she received a bond. When she received a bond it was subject to this condition. Whoever took the bond knew this. The *State under the authority of the General Assembly has* alienated this lien, whatever it may be, to Duncan, Iselin and Wilson for a full consideration and the corporation *has attorned.* The inquiry then is what claim have these plaintiffs, behind the back of the State, to ask for such a declaration? We are sure the Court will reply the Court cannot grant it under the conditions established by Tennessee.

II.

The State of Tennessee was anxiously solicitous and provident to exclude persons or corporations without an exception from obtaining from the Mobile & Ohio Railroad Company by any gift, or conveyance, or by any *creation* of her own, any sort of lien, encumbrance, or mortgage to have a priority over, or to come in conflict with the lien of the State, and it asserts anew its priority over all and every claim, and annuls in advance all such creations and conveyances.

III.

The Signification of the Agreement of Tennessee to Loan her Bonds to the Companies; of the Loan to the Mobile & Ohio Railroad Company.

The companies received the bonds after the signature of a receipt in the office of the Comptroller. The delivery to the corporation conferred a title to that corporation—the object of the delivery was that the corporation might sell them at their par value, and should apply the money to the construction of the railroads. Tho bonds are not bills of credit to circulate as money, and to be a measure of values, and to be convertible into gold and silver. On the contrary, they are to be sold, they may become subjects of speculation and their value fluctuates as other commodities. They do not circulate nor enter into the current transactions of commercial business like bank notes, bills of exchange, promissory notes, or other effects of commerce.

2. The bonds of a State differ from individual obligations in the fact that they rest entirely upon the responsibility and the faith of the State—there is no presentment, demand, protest, notice; there is no suit at law to recover the principal and interest by judgment and execution. The interest is payable out of funds collected in the treasury and subject to the control of public officers by authority of law, who draw their warrants.

3. Usually in cases of an issue of bonds there is a provision for an amount to be annually raised to constitute a sinking fund, in order that the capital of the debt shall be conveniently paid before maturity of the bond. This is commonly accomplished by purchase of the bonds; or by investment and reinvestments so that the smallest sum may be capitalized and made to bear interest. No purchase of bonds takes place except to extinguish the debt.

Acts of Tenn., 1859–60, secs. 2–6, 10.

4. The loan of the bonds of a State, in large sums, as contemplated in the statutes of Tennessee, to railway corporations belong to the class of loans for consumption—such as loans of money or of objects to be consumed or disposed of, where the borrower engages to render an equivalent in money, in case that he shall not be able to make a restitution in objects of a like character and quantity. In the instance of the Tennessee loans the State had fulfilled her entire obligation to the companies at the completion of the railroad, and she had delivered the last instalment of bonds. *She had no interest after the completion of the railroad that her bonds should remain in circulation.* The return of the bonds and their cancellation was in every respect desirable. The continuance of a bond in circulation was only a matter of convenience to the borrowers, who might not be able to purchase them.

5. The State had no interest in the question whether one bond or one issue of bonds were redeemed, or another. All of the bonds were of the same amount; the semi-annual payment of interest was made at the same dates—January and July of every year—and for the same sum of thirty dollars on each bond. The public faith is pledged in the same words in all, and the public credit is broken in the same manner in each case.

6. The corporations had a right to return bonds of the same quantity and quality—bonds of the same character or a like character under the law of the contract of loan. So the State of Tennessee had a right to exact a return of bonds as the mode of payment. The payment of the bonds of the State means primarily the return of the same bonds to the State—the return of bonds of a like character of bonds, bonds of the same series, as to amount, days of payment of interest, date of maturity to the State—bonds of same quantity, quality and value, or money to pay for such at the day of payment. The contract to make this payment is made between the State and the corporation, while the corporation is the holder, and the State has just received the lien. At that instant

the corporation might have returned the bond or bonds of the like character, as we have described the meaning. In practice the corporations returned bonds for a long term, and in respect to these, the coupons of interest were returned in place of money. Any overdue coupons would have answered.

In the common law practice, all personal actions sound in damages save only debt and detenue. The Courts of Chancery have enforced contracts for the delivery of bonds and stocks where such was the contract.

The inquiry here is as to the import of the contract irrespective of the remedies for enforcement. In Louisiana a plaintiff may sue for the *thing* or for damages and no difficulty can arise except as to the real and *intrinsic* right.

4 Pothier du Pret de Consomption, 48–54. C. C. 1926.
Story on Bailments, Sec. 228.
26 Laurent droit Civ., Sec. 508, p. 524.
1 Domat des lois du Pret., Tit. VI, p. 231.
Pomeroy on Contracts, Secs. 14–22. Notes.
Egerton vs. Buckner, 4 Rob., 346.

ARGUMENT FOR THE DEFENDANTS.

I.

The Mobile & Ohio Railroad Company acknowledged the receipt from the State of Tennessee of 1,296 bonds, issued after the 16th of June, 1856, and between that date and the 11th of June, 1861. On the first day of July, 1871, the account of the State showed a demand on the Mobile & Ohio Railroad Company for the sum of $1,684,800, of which sum $388,800 was for interest in arrear, and the remainder was represented by the principal of the 1,296 bonds, some of which matured the 1st of January, 1892, and others the 1st of January, 1898. This demand of the State of Tennessee was settled in January, 1872, by the delivery to the State of Tennessee by Wm. B. Duncan, Adrian Iselin and

R. T. Wilson, 1,296 of the bonds of the State of Tennessee of the same character as those described and issued by the authority of, the same legislative acts as those received by the Mobile & Ohio Railroad Company and were charged to that company by the State, and twelve thousand nine hundred and sixty coupons overdue, of the same character as those contained on the same class of bonds; and any balance was paid in money. The State with the consent of the corporation received this payment and discharged the Mobile & Ohio Railroad Company, and substituted the intervenors to the place of the State with all the rights which had been *invested in her*, by reason of the issue of the bonds first mentioned. This mode of liquidation and payment is a *novation*. A novation may be made in three different modes, forming three different kinds of novation. In the first, there is no intervention of a third person, as where the debtor contracts a new engagement with his creditor, after being liberated from his previous engagement, as the consideration for paying something different from that promised. The second species introduces a third person as a new debtor, as where he assumes to pay the debt of another, on consideration of the debtor's release.

Curtis vs. Brown, 5 Cushing, 492.
Caxton vs. Chadley, 3 B. & C., 519.

The third mode of Pothier is by the intervention of a new creditor who agrees to pay the debt of the debtor upon an agreement of the debtor that he will re-imburse the former. This novation is completed by the consent of the creditor, the debtor, and the third person—the intervenor who agrees that this last shall be the creditor and the former creditor paid. The three modes are all disclosed in the different overtures contained in the acts of 1869 and 1870 of the State of Tennessee.

Evans Pothier on Ob., 339, 340, 349; Pollock on Cont., 190, 191; 2 Chitty on Cont., 1371–1375, 11 Am. Ed.; In re L. Rep., 9 Eq., 306–318.

The motive for a liquidation on the part of the company, originated in the embarrasments both of the State and the corporation, which involved the public interest and precluded both of these parties from maintaining the same relations which had existed before their altered conditions as to property and credit had arisen. Those acts of 1869 and 1870 implied on the part of the State a confession that the existing relations were pernicious to the State, and that another creditor might improve the condition of all interested. The Mobile & Ohio Railroad Company, in the year 1871, authorized Duncan, Iselin, and Wilson to make the arrangements suitable for the execution of the plan embodied in the seventh section of the act of 1869 and the amendment thereto in the second section of 1870. The arrangements were all completed in January, 1872, wherein the State of Tennessee absolved the defendants from making any payments to her as a debtor for the bonds she had received from the State during 1856–1861, and subrogated Duncan, Iselin and Wilson to her rights of every kind with the consent of the defendants. Pothier, in the chapters before cited, instructs us that the consent which the creditor, the State of Tennessee gave for this novation of the debt in the manner described is an equivalent to the payment of it; and that none can make a novation but those who may validly receive a payment of the debt. The effect of a novation is to extinguish a debt in a like manner as if there had been a payment in accordance with the tenor of the obligation or promise. "Novation is a mode for the extinguishment of obligations equal to a payment."

28 Demolombe, p. 237, sec. 302.

The debt or duty of the Mobile & Ohio Railroad Company to Tennessee arises from the fact of a delivery to the company of 1,296 bonds at different dates, commencing on the 17th of June, 1856, and continuing till June, 1861, each bond for $1,000, and payable to bearer, which might be sold at not less than the par value, and the money was all to be applied to procure materials and

equipments for its railroad within Tennessee. This contract was made on the part of the State to promote a public policy, and on the part of the company to speed the completion of its great enterprise, involving it in large cost and expenditures. The State of Tennessee did not take a bond, nor a written obligation nor acknowledgment from the company of the debt, neither in respect to the use of the bonds, nor in respect to the conditions of re-imbursement of bonds, nor of principal or interest, nor mode of indemnity. The corporation did not indorse or guarantee the payment of the bonds of the State, and her name does not appear in connection with them, except in a single instance. When those bonds were delivered to the Mobile & Ohio Railroad Company, a receipt was taken from the company by the officer of the State who performed that act in a book kept for that purpose. In the third, fourth, and twelfth sections of the Act of the Legislature in 1852, there is declared that the State of Tennessee shall be *invested with a lien, without a deed from the company*, upon the railroad corporate stock, superstructure, equipments, depots, stations, and rights, for the payment of the bonds and the interest accruing on them, without defining any form, or mode, or time of payment, and the State expressly reserves a right, thereafter, to pass all laws deemed necessary to protect the interest of the State, and to secure her from loss in consequence of her issue of bonds under the act of 1852. The sections of the act aforesaid, before the issue of the bonds and as a measure of protection, deprive the corporation of any capacity to give, create, or convey to any person, or corporation, a lien or mortgage to come in conflict with the lien of the State so invested; and declare that she shall have a priority over all other claims, existing or to exist, and that any such liens or incumbrances shall be null and void against the lien of the State.

It is this lien thus reserved, and if need be fortified, which makes the subjects of the two acts passed by the Legislature of Tennessee, one on the 25th of February, 1869, the other on the 25th of January, 1870. The first act bears date about three years

before the arrangement made in 1872 with Duncan, Iselin and Wilson, and the latter act two years; whereby they surrendered to the State 1,296 bonds, similar to the bonds produced by the plaintiffs in this cause, and 12,960 coupons overdue at that date, and like the bonds and coupons before this Court in the record. The bonds and coupons were a portion of the State debt, created through the terms of the act of 1852. All are issued by the State pledging her faith, and affording no other security, and making no promise of, or reference to any other security. This corporation is not a party to the bond. The State kept an open account with it. She charged it with the amount of the bonds, and credited it with the deposits of interest directed to be made in the act of 1852 and the sinking fund paid.

The twelfth section of this act is applicable to all of the corporations, which, at any time, have become parties to the system of the State, and it forms a conspicuous feature in the various legislation which, from time to time, was adopted before its entire dissolution in 1877. This is a reservation of full power to enact all *such laws*, as the legislature *may deem necessary* to protect the interest of the State, and to secure the State from any loss because of the issue of bonds under the terms of the act of 1852. The act of 1852 directs the corporations to set apart one per cent. upon the amount of the bonds received, to commence with the completion of the railroad, and the plaintiffs have argued, that there may have been cases where the railroad remained unfinished, and that no demand for a sinking fund could be enforced. In the instance of the Mobile & Ohio Railroad Company this suggestion is without application. Before that company was in condition to have bonds, the legislature enacted that in all issues thereafter made, a sinking fund should become payable five years after the date of the bond, amounting to two per cent. per annum, for the ultimate redemption of the bonds; to be paid to the Governor, Comptroller and President of the bank of Tennessee for management, and who were to invest it in the bonds of the State.

Laws of Tenn., Ch. 120, p. 144, 1855–6.

In an act passed March, 1860, the sinking fund was increased to two and one-half per cent., and also that the sum should be passed directly to the credit of the party paying, and be a release of that amount of debt due to the State by the corporation, and payment might be made in cash or in the like character of bonds issued to the company.

Laws of Tenn., 1859–60, Ch. 93, sec. 1, 3, 5, 9.

The failure to pay the amount of this sinking fund entitled the State to prosecute a suit in chancery against the company, and to obtain a decree for the sale of the railroad, and all other property of this company. In an act passed in 1865, it was enacted that the company should pay the amount of "indebtedness to the State as a sinking fund," "to be paid in bonds of a like character with those issued," four per-cent. payable semi-annually.

Chap. 9, 1865, sec. 7.

A calculation is attached to a brief of Mr. Southmayd which shows that the sinking fund at one per cent. would have paid the debt in thirty-three years and a few months. The demands of the State for the payment of interest, or for sinking fund, were in respect to a large majority of the corporations, ineffectual from 1865, and thenceforth. Nor did the enactment of laws for the seizure and sale of those railroads have any more effect. The power of the State to accomplish the result of restoring the corporations to activity and vigor proved to be insufficient. There was a general suspension of payments of interest, and of sinking fund. The debt to the State from the corporations was continually increasing; the credit of the State had been prostrated by the facility with which new issues of bonds had been made immediately upon the close of the war. The necessity for laws to protect the interest of the State and to secure her from the conquences of the issues of bonds became apparent to all. The investiture of the State, with an absolute lien upon all of the

railroad property in the State and authority over all of the corporations named in the various acts of the legislature arising particularly upon the delivery of the bonds, and falling due upon the completion of the railroad, became of very great importance in the emergency, and seems to have been fully appreciated about the year 1869 and 1870–71. The examination we have made of the terms of those acts, demonstrably show that the State had never made any cession or assignment of the ESTATE which was invested in her, by the force of her enactment, and without a deed from any of the corporations, in the entire property which any one of them had in Tennessee as corporate property: or as connected with the railroad for her security against any loss to arise from the issue of bonds to them. Her bonds were to be sold in distant markets by the corporations, and are free from any reference or allusion to any source of ability or of trust, except the promise of the State to make the payment according to the tenor of the bond. The bonds, in their legal effect, are payable to the *bearer*, and as such have obtained currency. A recital in the bonds that they had been issued to the Mobile & Ohio Railroad Company, and a lien had been reserved upon its property to inure to the holder for his security, would have placed the subject beyond a discussion or dispute. The seal of the State is the only seal on the bond; the faith of the State is irrevocably pledged without further assurance or additional security. The holders of the bonds of the State have not asserted against the corporations since that period, the fact of an existence of a prior and paramount lien, which formed a part of the paper and was wrapped up in the folds of every bond issued to these companies and which covers all of the railroads in Tennessee and all of the equipments and whatever is incident to them, until the time these suits were commenced in 1879. The Mobile & Ohio Railroad Company has never charged itself with any claim of any boadholder of the State. The acts of 1869 and 1870 were duly enacted by the Legislature of Tennessee and all of the settlements were made under

these acts by at least eight corporations. The first settlement was made in 1870, the last in 1878. The Mobile & Ohio Railroad Company made her settlement in 1872. The settlement was made under *laws* which had been in force for a term sufficient for all interested persons, to obtain a knowledge of their contents. The bonds of the plaintiff had been issued at least eleven, and possibly fifteen, years before this date. The interest had not been paid on them for some years. The same cause of suit, which the plaintiffs now submit existed at that date. These two acts operate directly upon the claim they now prefer. The State claimed then, as she had done all the time, to be invested with a paramount lien upon the property of this corporation, to satisfy a debt which she had recorded in the books of her Comptroller, for bonds she had loaned to this corporation, and which debt being unliquidated and the corporation being exposed to the statutes of the State empowering the officers to seize and to sell the property for arrearages of sinking fund and interest, proposed to the corporations so situated, as was this company, a novation of the debt, if practicable. The State was a sovereign with faculties to make laws for cases of this description to affect property and persons in the State. She had, in the concerns of the corporations, employed an administrative power of a wide range in the collection of interest, sinking fund, and regulation of companies. She had been a *negotiorum gestor* for persons who were creditors. In this emergency, these *laws* of the State were enacted to settle by a *novation*, to secure the State from loss, and to protect her interest, were submitted in 1869, and amended in 1870, to all of those indebted to her under the acts concerning internal improvements.

II.

The adverse pretensions of the plaintiffs are, that at the date of these enactments, and at the date of the settlements made with the State in any form under them, and at the date of the commencement of these suits, by the inherent virtues of the bonds, they

hold of the State of Tennessee issued to the Mobile & Ohio Railroad Company in 1856–61, they have an estate, a mortgage lien, co-extensive with the estate and the mortgage lien described in the third and fourth sections of the act of 1852; and that in their relations to this estate and lien they have displaced the State of Tennessee, so effectually that the State of Tennessee is not to be accounted as a claimant, nor her assigns. They are not necessary parties to this suit. The only parties proper, they say are the parties to the contract: the Mobile and Ohio Railroad Company is the debtor, the plantiffs are creditors. Pollock, in his chapter concerning parties affected by contracts, says: "The fundamental notion from which we must take our departure is one common to the English system, the Roman system, and the modern law of civilized States, derived therefrom. This principle is: 'No one but the parties to a contract can be bound by it, or entitled to it.'" Pothier, says: "That agreements can have no effect except between the contracting parties, and consequently, that they cannot acquire a right to a third person who is not a party to them."

Pollock on Cont., Ch. V., pp. 170, 174.
Anson on Cont., 193, 194.
Evans Pothier, Ch. 1, Art. V, p. 29.

Pollock explains the rule. "(1) The original parties to a contract must be ascertained at the time when the contract is made. (2) The creditor can demand performance from the debtor or his representatives; the creditor cannot demand nor be required to accept performance from a third person. (3) No third person can become entitled by the contract itself to demand the performance of any duty under the contract. (4) Persons other than the creditor may become entitled by representation, or assignment to stand in the place and to exercise his rights under the contract." Anson supports substantially these rules without quoting them and with less precision of statement, pp. 190, 193. We shall hereafter discuss the exceptions which have been made, or perhaps, it would

be better to say the additional circumstances required, to enable a third person to become a representative or an assignee of an original party to the contract, or to receive a benefit from it.

The plaintiffs in this suit are owners of certain bills single under the seal of Tennessee, which leave a blank to be filled for the name of a payee, and which contain a promise to pay to the undesignated payee or order the sum of one thousand dollars with interest at the rate of six per cent. per annum, payable in New York, the 1st of January and the 1st of July, each year till maturity, according to coupons attached. These are drafts of the Comptroller on the Treasurer. The bonds are due in 1892 or 1898. The debt the plaintiffs claim to be due and which they would enforce, are a number of these drafts appended to the bond, and overdue.

The bonds will not be due during this decade. Sometime between 1856 and 1861 the Mobile and Ohio Railroad Company sold these bonds, but no stipulation for the payment of them was taken by the vendee; no responsibility was incurred by the sale, and no recourse on the bonds reserved nor contracted for.

Since the sale the Mobile & Ohio Railroad Company has had no connection nor contract with the holders of the bonds, and no holder of these bonds have made a claim upon them. It is clear, that upon the rules which we have quoted from the authors on the law of contracts, that no action can be maintained upon these bonds against this corporation. The second of the rules of Pollock and the first of Anson are precise and conclusive on such a question.

III.

The Mobile and Ohio Railroad Company constructed across the State of Tennessee 118 miles of railroad, from the Mississippi line to the line of Kentucky, and received for that purpose and for bridges 1,296 bonds; the first issue was in June, and after in 1856, of 430 bonds; in 1857, 388 bonds; in 1860, 350 bonds,

and the remainder in 1861. The completion of the railroad was in June, 1861. The section lien, as described in the third section, was temporary, and restricted to the section as prepared and the material when purchased and delivered. In the fourth section of the act "when *the whole of the said road shall be completed*, the State of Tennessee *shall be invested with a lien without a deed upon the Company*, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and equipments, superstructure, depots, stations, and all the property owned by the company as necessary or incident for its business; for the payment of all said bonds issued to the said company and for the interest accruing on said bonds. This section concludes "after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create, or convey to any person or corporation any lien, incumbrance or mortgage of any kind, which shall have priority over, or come in conflict with the lien of the STATE herein secured; and any such lien, encumbrance, or mortgage shall be null and void against said mortgage of the STATE, and that said lien or mortgage of the STATE shall have priority over all other claims existing or to exist against said company." In this lien there was a merger of the first liens. This lien is spoken of four times as the lien of the State in this paragraph; and five times in this section of the act.

The word *invested* is expressive of the entirety and exclusiveness of a possessory right when reference is made to the provisions relative to other claimants of liens or mortgages.

This preparation was made prior to any negotiations with any of the corporations or the issue of any of the bonds; the lien which is described in our quotation is the perduring lien which might apparel the railroad property thirty to forty years. The question to arise is whether the State has in advance of negotiation, or contract of any kind, with any corporation, or before any corporation had offered to borrow the use of her bonds, or had had an opportunity to do so, and while the Act of the Legislature was *in fieri* and had not been submitted to the Governor, employed

words which would rend this vestment into shreds and patches whenever bonds were issued and sold. The bonds show no alienation of this lien nor purpose to do so. The act shows none. In 1869 and 1870 the State did offer to alienate it in a great extremity and embarrassment after she had decided she could not maintain her system of internal improvements. Her poverty compelled her to surrender it. The last vestige passed away in 1878 at the date of the last settlement which was made under those acts. The State under those acts did propose to alienate her lien, and did so with an assertion of her plenary authority.

Prior to that date her acts are those of a proprietor whose estate is not embarrassed. The purpose of the act of 1852 was to establish a system—a system to be established in the State, and requiring supervision, control, management, and outlays of money and credit, all to be done by the State. The possession of a permanent estate in the property, called lien, mortgage, incumbrance, was an important, not to say an essential basis upon which the system must be founded.

IV.

The 1,296 bonds delivered to the Mobile & Ohio Railroad Company in the lustrum between June, 1856, and June, 1861, were dated on the first of January of the year of their issue; semi-annual interest was payable in January and July, in New York, and obliged the State of Tennessee to pay the interest and principal "at the time and place and in the manner specified" in the bond; and "for this payment the faith of the State is irrevocably pledged."

The bearer is payee of the bond and coupons. The bonds were delivered to the corporation for sale, but it was restricted, so far as that the bonds should be sold at par, and the money should be applied to the work of construction of the railroad. In some sense the Mobile and Ohio Railroad Company is a party accommodated by this loan of bonds, and the application

of this money to the construction of an internal improvement which it projected. The State of Tennessee was also a party accommodated, because her policy to establish internal improvements within the State was declared, and her determination to co-operate had reference to the increase of population and the improvement of the value of property. The relation which she established with the Mobile & Ohio Railroad Company was that of a *lender of her bonds.*

In the public records of Tennessee the bonds are termed *loaned bonds*, and in the accounts of Tennessee with the Mobile & Ohio Railroad Company the Company is charged with the *amount of the bonds loaned.* The legislature of Tennessee assimilates the obligation of the corporation to that of a borrower of things for consumption; and in some degree to the contract with a person accommodated by a loan of a note or a bill. In the act of 1860, and in the acts afterward, she is a lender and the corporations borrowers.

When we examine the acts of Tennessee we find the obligation of the corporation is deemed to be an engagement to provide the funds in advance, needful for the payment of the interest at the time it becomes due, and to provide a payment of the principal when it becomes due. And for any omission to do so the corporation is entitled to collect it with costs and expenses in a summary and efficient manner. The obligation of the person accomdated is to provide funds at maturity and to reimburse for costs and expenses.

Reynolds vs. Doyle, 1 M. & G., 750.
Sleigh vs. Sleigh, 5 Exch., 516.
Baker vs. Morton, 3 Barb.

The fifth section of the act requires the corporations to provide the money to pay the interest at least fifteen days before the day of payment into the Bank of Tennessee. The Treasurer twice a year leaves with the bank, the sum to be collected. All the money

collected is placed to his credit as interest. The payments are all mixed. If a company fails, the Governor forthwith and before the maturity, may appoint a receiver to take possession of the railroad and collect the money necessary.

We suppose that if coupons payable at a regular date had been deposited in the bank of Nashville they would have been received as sufficient. The obligation of the State was to pay in money of the United States, but if the State were relieved from payment by a cancellation of the demand that would suffice. Payment is liberation, and any mode of accomplishing that, is payment.

No corporation ever performed the act of payment of the coupons of interest to the holders. The corporations provided the money as an accommodated party to a negotiable note would do and thus fulfilled her contract. The State to be provided to pay the bonds when they become due, in the sixth section legislated for a sinking fund of one per cent. In 1856 prior to the issue of bonds to this corporation, this sinking fund was advanced to two per cent.; and after, in 1860, to two and one-half per cent. These acts in plain terms enact that the railway corporation is a borrower of bonds; that his assumpsit is to pay *to the State* the amount of the bonds; that he shall pay after five years from the date of the bonds two per cent.; that he shall pay in cash, or State bonds of a like character as those received by the corporation, and that payment in either form is a discharge of the debt due to the State by the company for the amount of the bonds. He is to be credited on the books of the Comptroller with the amount paid and be released from any further payment.

The lien invested in the State of Tennessee upon the corporate stock and property of the Mobile & Ohio Railroad Company was perfected in 1861 upon the completion of her railroad in that State, and had received her last instalment of bonds. All of those liens upon sections of thirty miles each, were at that date, merged in the one general and specific lien, described in the fourth section of the act. At this date, we suppose the relations between the State and

the corporation were fully understood. There existed at that date, upon the books of the Comptroller, a charge against the corporation for the whole sum of the 1,296 bonds which had been issued; and the company at that date had become liable for the sinking fund of two per cent., imposed by the act of February, 1856, upon the bonds issued in that year. The necessity for commencing this payment of a portion of this principal of her debt became apparent at the time that she had finished her railroad. She had labored in Tennessee five years. The obligation of the company was written down in the Comptroller's books, and in the books of the Treasurer, and in the statutes, as a debt which had been created, and was then deemed to be, a debt for a *loan of bonds*. The statutes imposed the duty to provide interest in advance to pay for the interest on this loan of bonds; the sinking fund was demanded to discharge the debt to the State for a loan of bonds, and at the rate of two per cent. annually, duly invested, the debt at this date—1884—would have been provided for. The plaintiffs have expended much effort to detach from the State of Tennessee all her vestment of a lien. The words in the third section, that the first issue of bonds shall "constitute a lien" is much dwelt on.

They represent that the living principle of the act of Tennessee is to be found in the paper and wax of the bonds, and wherever the bonds go, thither this spirit was to go, for the spirit is in the wax and the paper. But this is not true; the spirit of the act was in the honor and ability of the State of Tennessee. In her determination to fulfill her engagements, and on the accumulation in her own hands of faculties and resources to enable her to do her duty, she reserved the lien upon all of the property of the corporations to assist her in the performance of this task.

There is a close connection between the obligation to pay the bonds of the State and the fulfilment of the obligation of the corporations to provide the State with the means to do so, upon the requirement of the State. In the end the same result would be reached if both obligations should be performed. But they are

not the same, and the acts of Tennessee show she did not so regard them; nor did the corporation so regard them; nor did the bondholders so regard them. Each had a separate duty to perform. The corporation was limited to the performance of the duty she owed to the State alone. She was to conform to the enactments in which the State had prescribed to her the tasks. She was bound to obedience of the laws the State might deem necessary, and to follow the dictates of the State on the subject. The State did not charge her with duties to the holders of bonds. She did not bring the corporations to have any intercourse with them.

The bondholders were dependant on the legislature and the Governor and the fiscal officers. They were not dependent upon the corporations and had not the means to enforce against them a single claim they had.

VI.

The statute passed in 1852, by Tennessee to establish a system of internal improvement is somewhat anomalous. The act in many of the more important sections has no relation to but a single corporation, the East Tennessee & Virginia Railroad Company. The first nine sections refer to the duties of that company and it is enabled under the terms to borrow bonds. In the tenth section there is a group of twelve corporations introduced to share in the like privileges and to be put under similar restrictions, and in somewhat confused terms, arrangements are made in the fifteenth and nineteenth for others. At the next session of the Legislature another group was introduced and finally some thirty corporations compose the system. To elaborate another act so as to make a congruous body of legislation was not attempted. The twelfth section of this act was the complementary measure, which was designed to supply whatever of regulation, or of reservation which might become necessary, to accommodate the laws to the demands of a system which was novel, and which was becoming more extended, and more complicated in its administration.

That section expresses that what had been done was provisional, and that the STATE OF TENNESSEE *expressly* reserves the RIGHT to enact by the legislature thereof, *hereafter*, all such LAWS as may be deemed necessary to protect the interest of the *State* and to secure the *State* against *any* loss in consequence of the issuance of bonds, under the provisions of this act. The basis of all this legislation would have been uprooted by an enactment that the paramount, exclusive and comprehensive lien or mortgage with which the State had been *invested* and so carefully guarded, as soon as the sale of the bonds had been made, would be dispersed in every direction and that the authority of the State was without foundation or support.

The estate with which the State was invested was for her own protection; to enable her to take measures to protect her interest and to save the State from loss, through agencies of her own appointment, and who were accountable to her only. The payment of the interest on the State bonds was an aim, a fixed purpose, which involved the pledge of the public faith as did the payment of the State bonds; the salvation of the State from loss, and the protection of the interest of the State, were to all appearance identical with this.

The question is not this. The question is, did the State of Tennessee place beyond the control of her Legislature in the third and fourth sections of the act of 1852, irrevocably, the estate with which she had been invested in that section. There are seventeen (17) cases enumerated on the pages 163 and 164 of the brief of the plaintiffs pending here—the object of all of them is to establish a stultification of the State of Tennessee by reason of a few words in her legislation, and that as a consequence therefrom, all of her legislation and administration during these long years of travail and trouble has been merely suicidal and impotent. This Court is called upon to undo all that has been done, and to accomplish now, for these plaintiffs, what their imaginations had not conceived, that it was either possible or proper for them to ask of any tribunal to do for them.

Swift has called "Law, a bottomless pit, a cormorant, a harpy that devours everything," "the plainest case in many words entangling." Procedure may sometimes seem to be so. The legislation of Tennessee relative to railroads between 1861 and 1865, if any, is of no interest to this discussion. The amount of sales of United States military railroad property under executive orders in the military division of Tennessee between August 8th and October 16th, in 1865, under the direction of Quartermaster Crilly, amounted to $6,126,766.62.

The Mobile & Ohio Railroad Company was a purchaser for $420,143.70. The destruction must have been nearly universal, for the only property captured and returned were four locomotive engines, two engines with tenders, one clock regulator, four flat cars. This statement is taken from reports of the War Department to a committee of Congress in 1867. The sales made of railroad property under chancery proceedings in the name of Tennessee is stated to be $6,698,000. The sum collected under the substitution acts is $14,692,768. The aggregate of settlement is $21,390,768. The effect of the settlements was to withdraw from the market this amount in State securities. The public at large had never made a difference in the bonds of Tennessee, because of an opinion that some bonds were secured on railroads, and some not; and that some of the railroads were more valuable than others.

In the treasury accounts of Tennessee, moneys applied to the payment of bonds were commingled and paid out without reference to the source of the receipt or deposit in the treasury. The quotations of prices of Tennessee bonds show the same prices for all the bonds alike. All of the payments of bonds to the State might be made in bonds of a like character where bonds are receivable.

Ch. 93, Acts 1859–60.

It certainly could not have been to the credit of the State that the different classes of her bonds should have varied in their

market value because of the condition of the character or credit of one or another of their railroad corporations. Certainly, Tennessee has not certified to such a policy by any words contained in her bonds; nor by any acts of her administration; and none of the language of her acts of legislation should be interpreted to mean what her conduct contradicts, and which no bondholder supposed to be the meaning of her policy, or of her administrative action, or of the words of her laws, until her policy had been carried out and rights had been fully vested upon action in accordance therewith. In the case of the Mobile & Ohio railroad corporation an entire re-organization and adjustment of all of her affairs repose upon the recognition of the action of Tennessee as supported by the courts of the United States and of the State of Tennessee in the decisions in Tennessee in which this company has been a party.

VII.

The legislation of Tennessee respecting her system of internal improvements in its general scope, or as considered in all of the details as set forth in the sections of the act of 1852, and the act of 1856, and of the act of 1860, the act of 1867, of 1869, and the acts of 1869, and the acts of 1870 and 1871, which prescribe methods of administration, or as enforced in judicial or administrative action in appropriate cases, show that the main purpose was to establish a *system* of improvements by the loan of State bonds of *equal value* to corporations which demonstrated ability and resources to do what they proposed to do.

The State consented on proofs to lend her bonds as the construction advanced, reserving liens as the work progressed to be made general, and pervading, and defined, at the consummation of all of the work of construction, and of equipment, and made suitable for operation. At this time the State became concerned in respect to management, and of such management as would certainly result in the regular, orderly, and certain provision of

moneys for the State to meet all of the *obligations* (called in her treasury statements, "*liabilities*") she had assumed or issued on their accounts. The imposition on the corporations in respect to the sums to be paid do not go beyond what is legal and reasonable; the powers to enforce the collection are severe and summary. The State tenaciously, and with judgment as a matter of law, and not of deed or grant or contract, but of law prescribed for acknowledgment and obedience, became *invested* with a potential estate in all of the property of the corporations, so that no impediment should be interposed to her system, either of government or administration for the protection of the State and the preservation of the State from loss.

The self-regarding legislation of this State is entirely inconsistent with a cession of the lien she had been vested with to the holders of her bonds, so that *they* should use it for their separate and individual protection in what was then deemed a contingency not to be conceived of—the failure of the State and the failure of such a number of the corporations, so as to reduce the State to bankruptcy. If there had been any prevision of the events to occur none of the bonds of Tennessee could have been negotiated at all. Nor did Tennessee suppose that such events were within the range of possibilities. Her bonds express her confidence and trust in the future. These bonds speak to all men:

> "The full interest and purpose of the law
> Hath their relation solely to the promise
> Which here appeareth clear upon the bond."

So declarative and emphatic is the bond of the contract to which the State is a party, that the holder made no appearance in the discussions between 1865 and 1878 when the railroad corporations as parties to the State system had finally disappeared by the last settlement to be made and which was made in that year by the Chicago, St. Louis & Chicago Railroad Company of the debt of the Central Mississippi Railroad Company.

One of the plaintiffs, P. C. Geddes, wrote to the Governor of Tennessee of date the first of August, 1877, more than five years after the settlement of the Mobile & Ohio Railroad Company:

"*The debts of the railroads to the State* may be regarded as practically settled. What remains is simply a question between debtor and creditor. Freed from the complications which grew out of this railroad debt, the discussion will be very clear and simple henceforward." Plaintiffs' brief, p. 155.

"There is but little doubt that the last of *Tennessee's advances to the railroads within her bounds*, will be paid off early in the fall, thus freeing her and *her creditors too*, for that matter, from a troublesome disorder." Plaintiffs' brief, p. 157.

It seems to have been fully recognized in the departments of the State government and among the railway corporations, that the State was the creditor of these corporations. It fully appears that the State was a debtor by the terms of the bonds to whomsoever should be the holder, and that a bond so framed is valid, and so each holder understood.

White vs. Railroad, 21 H., 575.
Prewitt vs. Chapman, 6 Ala., 86.

When the overturn of the corporations took place, the holders of bonds at once resorted to the State, and the negotiations between the bondholders' association and the State form a part of the proofs in the cause. These parties regarded with satisfaction the settlements which they are impugning in this Court. The State before that time, had menaced the corporations with every form of coercive measure, so as to compel the payment to the State of the amounts borrowed in bonds and for interest. The twelfth section of the act at this time acquired prominence from the fact that the State had exhausted the remedies, which had been sufficient in the regular course of a peaceful and prosperous administration. No forebodings or auguries had prognosticated civil war as involving the interests of the State, or as exposing the State to loss because of

her issue of bonds. The plain and manifest language of this section is of plenary power to legislate in case of any adverse conditions in the internal affairs, to make laws necessary to meet these conditions. The legislature of a State is dominated by its constitution and by the prohibitions contained in the constitution of the United States.

This section prohibits the impairment of the vested rights of the stockholders of these corporations. The Mobile & Ohio Railroad Company *consented* to this settlement in 1872, and to the intervention of Duncan, Iselin and Wilson as subrogees. Their contract was maintained and the priority of their lien established in the Courts of the United States in Tennessee, and on the basis of the decrees the re-organization took place. The constitution of the United States cannot be invoked for any purpose. No contract has been made between the Mobile & Ohio Railroad Company and these plaintiffs. The relation of the Mobile & Ohio Railroad Company to the State is not that of a contractor or bargainor. The corporation accepted conditions contained in the laws of the State which superinduced the obligation to do and to perform in accordance with other conditions in these laws, and the relation may be called contractual, consensual, or the relation can be described as one imposed by the supreme power of the State wherein she commands the corporation and the corporation renders obedience. The legislature, the executive, continually appear in the dictation of the thing to be done and the compulsion exerted to accomplish it.

In the absence of constitutional restraints the legislature is the appointed arbiter to determine what rule of conduct is to be observed by these corporations.

The legislature *invested itself with all of the property*, excluded from its presence any conflicting or opposing *estate* and reserved the *right* to pass all the necessary laws for the public good. Its condition was that of an owner with no opponent nor rival.

Its statutes show that Tennessee did reserve to herself an *absolute* and an *uncontrolled* and *uncontrollable judgment* and

power of legislation to meet any exigencies. Lord Chancellor Cairns, in one of his opinions, has said, "My Lords, larger words than those, appears to me, it would be impossible to introduce into a will. The trustees are not merely to have a discretion, but they are to have 'uncontrollable,' that is, uncontrolled discretion. Their discretion and authority, always supposing there is no *mala fides* with regard to its exercise, is to be without check or control from any superior tribunal. What is the subject matter with regard to which they are to exercise this discretion and authority? The subject matter is the payment or the application, not merely of the whole of the income of their real or personal estate, but of such portion as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so, what part and how are they to decide if they do not apply the whole; what is the part which they are to apply? They are to decide upon this principle that it is such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefitted, but such person as they shall deem expedient; and upon the question of what is expedient it is their discretion which is to decide, and that discretion according to which they are to decide is to be uncontrolled."

The Chancellor enquires whether in such a case he could apply the rules, which sometimes the Court employs to regulate the discretion of the trustees. He answers: "My Lords, to do so would simply be to reverse the words used by the testator and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable shall be controlled and be subjected to that rigid and unbending rule upon which the Court of Chancery acts upon those occasions when it has to perform the functions which in this instance the trustees and not the Court have to perform."

Gisborne vs. Gisborne, H. L. 2, App. Cases, 300.

Tabor vs. Brooks, 10 Ch. D., 273.

The State of Tennessee proposing to establish a *system* of internal improvements in the State and to engage the public faith in a great sum for the period of thirty or forty years, the life of her bonds, and during that period to pay the interest semi-annually, and to collect the sums thus payable from a number of railway corporations, elaborated statutes to provide for the accomplishment of her plan, without loss or damage to the State, by putting the railway corporations under severe rules and restraints. She is invested by statute with a mortgage lien which affects the corporate stock, and every portion of the railroad property, to secure the bonds which the State shall issue, and excludes every other lien which shall come in conflict with this lien. Through this lien the State has collected the interest, exchange and commission. She has collected what sinking fund there has been collected. She has made the sale of the railroads which were deemed insolvent and has made her settlements with the remainder. All this was done under the rights in the property and the powers to enact laws embodied in the act of 1852 and the amendments.

VII.

In the years 1869–70 there appeared to be a necessity for some action on the part of the legislature which would ameliorate the condition of disorder, derangement, and of financial distress in that State. The credit of the State was prostrate, so that she could not restore the railroads to a condition for use. The railway corporations could not borrow money to improve their roads because of the existence of the lien of the State as a first mortgage, excluding any other. On the Mobile & Ohio Railroad Company the sum secured was above fourteen thousand dollars per mile, and the State could appoint a receiver at any time or might make a sale under existing statutes. The State might detach her interest from any other party, and sell her own interest in the railroad, apart, and without any concern with the other distinct interests. This caused the adoption of the statutes of 1869 and 1870.

The propositions were addressed impartially to all of the corporations in the State, and to all of the holders of State bonds, and to all persons with capital to invest.

1. Any railroad corporation might repay any amount of the principal of their indebtedness to the State, in the bonds of the State, in such amount and at such time as may be practicable. The corporation might issue its bonds of equal amount and denomination, to the State bonds it should deliver to the State, and these bonds should have a lien corresponding to the debt it had paid off.

2. Any person or corporation may pay off the indebtedness of the corporation to the State, with the consent of the debtor corporation, in the bonds of the State, and on doing so, be substituted to the debt and all the liens of the State against that corporation which the State had or has; this privilege can be enjoyed by any one who makes a partial payment of the debt, and be substituted to liens for so much as he shall have paid.

3. The debtor corporation may make its bonds corresponding to the bonds it borrowed, and upon the payment of the debt in bonds of the State the liens may be transferred to the bonds so used.

In an unfavorable report on the act in the House of Representatives of Tennessee a paragraph will fairly represent the objections. It is "Finally the bill while it affords the privilege to the railroads of discharging their liabilities to the State in any of her outstanding bonds, provides no compulsion on them to do so. There is not even a provision as to a limit of time in this respect. *Is it certain that the solvent roads or any of them will under* the provisions of this bill retire, and so diminish the amount of outstanding bonds? Of this we *have no assurance and the reasons for fearing a contrary* result are not a few." We have quoted the letters produced to the Court from one of the plaintiffs, dated years after the enactment of the two statutes in which the full accomplishment of the policy they embodied had been successful,

rejoicing that now no further obstacle to the State's final settlement of the State debt. Plaintiffs' brief, pp. 150, 157, 159. Their counsel to the Governor of the State had been to require of these debtors of the State to pay their debts within a reasonable time as they might well do, and the delays of some of those corporations were matters of complaint in the legislature, and among the creditors of the State. These creditors were urgent for these settlements, as the terms of the acts of 1869 and 1870 permitted. The absence of opposition to such settlements during this period by the plaintiffs, while the State of Tennessee was exhausting the power of the State in respect to the sales of railroads owned by insolvent corporations, has not been explained. Every one of the settlements necessarily demanded labor and expense in the collection of the bonds of Tennessee to meet the debt of the State. There was intercourse, inquiry, discussions in respect to the action of the State, and the rights of all the various parties concerned in her financial arrangements. None of these things were done in a corner. What explanation of this absolute indifference is made in these proceedings? We find none at all. All of the settlements were made upon the assertion of the validity of the *laws* enacted by the State, to the end of protecting her welfare and securing the State from loss. There is in those acts a plain affirmance of the fact that the State at the date was a creditor of the corporation. That there was indebtedness and a lien upon the property to secure the State, an enduring and a valuable estate, which the State might alienate, and anxiously sought to alienate because of complicated embarrassments. The rules of chancery which protect a *bona fide* purchaser who deals with facts of a public nature as existing without notice of their infirmity from those persons who are in a condition, and have an interest to disabuse them of error or misunderstanding, and is encouraged by reserve, silence, or inaction when such are inconsistent with their connection with the subject, are available to such purchaser as a defence. Acquiescence in this case is not that

of inaction or of indifference; the State of Tennessee occupied a position not merely of command as a legislator, but she was a public administrator, a *negotiorum gestor*.

These very plaintiffs aver in their briefs, in their pleadings, that she was a trustee, a fiduciary the despositary of rights and faculties to be employed for the holders of her bonds. Concede the fact to be so. This State through her legislature enacts *laws* which are to determine the relations of the State, the railway corporations, the holders of State bonds. There is no mistake to be made of the design of this legislation, nor in respect to the claims of the State to interpose in this day of calamity. During a period of nine or ten years from the date of her legislation there is a gradual and steady, but not hurried or rapid progress to the full accomplishment of all that had been projected by the legislature. The laws became inoperative because of their entire fulfilment. It was some months after the last settlement had been completed in 1878, that these suits were commenced in the Courts of the United States in Tennessee.

Leeds vs. Amherst, 2 Philips Ch. R., 117.
Williams vs. Morris, 95 U. S. 444–457.
Grymes vs. Sanders, 93 U. S. 55, 62.
Wellmat vs. Barber, 15 Ch. D., 96–105.
Rawsden vs. Dyson, L. R., 1 H. L. 129, 140, 168.
12 Wall. 47; 9 Wall. 254.
Upton vs. Trebelcock, 91 U. S. 45.

VIII.

The claim in the bill is, that when these acts were enacted as laws of Tennessee and the State claimed, there was an indebtment from the Mobile & Ohio Railroad Company to the State, and other corporations also which had been recipients of bonds under the acts concerning internal improvements, that they were merely an evidence of the silly, credulous, imbecile, and irrational condition to

which the State had been reduced, and that the fact was that all of the creditors of the State and of the corporations were the same persons, and were members of the Tennessee bondholders' association; and are the same respectable persons who are plaintiffs in these suits.

In respect to the lien of the State, they say that lien had been yielded when the bonds were delivered to the corporation and each bondholder carried this lien with his bond. The bond constituted the lien.

The relations of the Mobile & Ohio Railroad Company were initiated the 17th of June, 1856. In that year, that corporation received 430 bonds of the State of Tennessee from the hand of the Governor of the State. The bonds are payable to bearer, and payable in 1892, in New York by the State; and the State pledged her faith to make the payment, and that her Treasurer should pay the coupons for semi-annual interest, of thirty dollars, in the same city from 1856 to 1892.

These bonds were a *loan* by the State to that company; that is their designation in all of her treasury statements, we are told, by the plaintiffs. These bonds were delivered for sale. The State had long before determined a minimum price. They were suitable for sale, pledge, exchange, hire. They were property. The loan by the State for consumption in this form was not gratuitous. There was a bilateral contract to which the State was one party and the corporation was the other. It was a commutative contract. Before the bonds could be acquired the corporation was to furnish proofs of ability, resource, of capital expended, and of work done, and so done as that the expenditure of all of the par value of these bonds upon it would make a public highway suitable to be a part of a system the State desired should be established in the State to promote its prosperity. The State of Tennessee was not an ordinary lender of money or bonds. She announces that her purpose was to establish a system in the State. Her aim was to secure material improvements to serve her people.

Before one of these bonds could have been sold, and as they were just delivered to the corporation, the State prescribed a secu-

rity in the nature of a lien or mortgage; this lien was invested in the State herself, and it is said the bonds constitute a lien upon what had been done and might be done on the section, and so liens arose as the work proceeded, and finally upon the completion of all the work, and the issue of all of the bonds, there is a full and adequate description of what the lien covered, and in whom it is invested, and why the State had invested the lien. We have quoted and examined the fourth section of this act in which this lien is described.

This loan of the bonds of the State to mature thirty and forty years after their date, and payable to bearer at a distant city, did not imply that the *borrower* should pay off these bonds, or the coupons appended to the bonds, from time to time, as either became payable. The bonds and coupons were alike payable to the bearer, and payment according to the tenor of the bond was a payment to be made by the obligor. In the absence of a precise direction in the bond, demand could not be made upon any other.

No demand for payment has been made upon a railway company. It is only in the archives of Tennessee that a record is kept of the issues made to the several corporations and the numbers of the bonds issued to the respective corporations. The bond affords no such information. The contract of a loan of this kind is, that the borrower shall restore to the lender the things lent in kind, of the same quantity and quality, and at the time agreed upon. The borrower of a hundred shares of stock, or a hundred bonds of government four per cents, would satisfy his contract by returning those of a like character. The State of Tennessee imposed in the act of 1852 the duty on the railway companies, similar to that of an accommodation party upon a bill of exchange. I have drawn the most rigid rule applicable to such a party. The accommodated party impliedly engages to provide at his own expense for the payment of the bill at maturity. Should he omit to do so, this accommodated party should pay costs and damages.

Chalmers on Bills, Art. 90, 229.

The demand for a *deposit* of the interest, commission, and exchange in the fifth section of the act, is a demand in advance of the rigorous fulfilment of this responsibility. But this proves to a *full demonstration* that the word PAYMENT means, in the intercourse between the State and the corporation, a provision for the payment by the company to the State. This same fact is elucidated by the sinking fund demand. That was to provide for payment at maturity of the State debt or before that maturity. The first act (1852) made provision for such a fund to be collected from the respective companies five years after the completion of the railroad; that is, after the full issue of bonds had been made to the corporation. The sum was one per cent. annually. In 1856, shortly before the Mobile & Ohio Company was in a condition to receive any bonds, this sinking fund was exacted five years after the date of the bond, and was increased to two per cent. annually, and in 1860 an additional one-half per cent. was added to the demand on the bonds issued. The *payment* was to go directly to the *credit* of the company; and to be a *release* to the company from that amount due by the company to the State. It was a payment. At the dates of these two acts the full issues of bonds had not been received by this corporation. They were not all received till June, 1861. The earliest requirement for a sinking fund would be made after this date upon that corporation.

The Mobile & Ohio Railroad Company, upon the acquisition of the full issue of bonds from the State, found that the comptroller of the State was keeping against that, and all other companies, a regular account in which the company was *charged with the amount of bonds issued to the company by the State*, and that the company was credited for the amount paid as sinking fund, and that the Treasurer obtained a statement of the account on the first day of June and December of each year; and thus he was able to ascertain the sum of interest he was to collect from each company. These sinking funds were payable in cash, or in like character of bonds of the State, which had been issued to the company. In

1860 the Tennessee bonds were in good credit. The same act describes the obligation of a company to be, "to provide the interest semi-annually as now provided by law for the amount of the bonds" loaned.

Laws of Tenn., 1855–6, Ch. 120, p. 144; Acts of Tenn., 1867, Ch. 17; Ibid. 1859–60, Ch. 93.

These are statutes which apply to the bonds issued to the Mobile & Ohio Railroad Company, 1856–61. There could be no doubt of the claim of the State on that company. It appears there as a debt for the amount of 1,296 bonds loaned to that company at the dates mentioned.

The obligation of the Mobile & Ohio Railroad Company was to repay the indebtedness to the State in bonds of the same kind and quality, or in their money value, if there be any special agreement relative thereto. In the act of the legislature of 1852, the duties of these borrowers was regulated in the act then passed, and by the 12th section a RIGHT was reserved to her to enact such laws as might become necessary to meet contingencies to occur. The obligation of the bond of the State is purely a pecuniary obligation. The purchaser of this bond was not a borrower. The obligation to raise a sinking fund of two and one-half per cent. to be paid into the treasury was founded upon the obligations of the corporation as a borrower and is one the State only could exact. The authority of the State to bring a suit for the sale of the railroad, either for a default in the payment of interest, or of a sinking fund, and that the moneys should be invested in the State bonds originates in this contract, and the reservations for legislation contained in the 12th section of the act. They show fully the immanent and perdurable character of contract and the lien, and that there has not been an alienation of it at any time before the acts of 1869 and 1870. Nor an offer to do so. The State, and the railway corporations to which the bonds of the State had been loaned, could not have misunderstood the relations

which had been established between them. Their intercourse, and the legislation which defined it, manifest a mutual comprehension of the terms of an intelligible agreement which was subject to modification in its performance under the terms of the 12th section of the act when the circumstances demanded it.

The conditions imposed upon a borrower of bonds seem to be exorbitant conditions, and those afterward superadded appear to be onerous and to be only justified by a necessity of an imperious character. The contract that the State insisted on as a lender of bonds, was that the corporation should provide, without cost to the State, the semi-annual interest with punctuality, so that the State should be ready; and that the corporations should pay into the treasury annually the moneys to enable the State to pay her bonds. It was not material to the State, which of her issues should be paid, for the bonds were alike in amount, and in time of payment and rate of interest. The obligation of the State is identical in each one, and the policy of the State was that they should circulate with equal credit. Nor have the creditors of the State before these suits entertained contradictory opinions to these. Their bonds speak the same language and convey to all the existence of the same obligation to every bearer; there is no endorser, nor guarantor, nor cession, nor assignment of an additional security in the form of an absolute and paramount first mortgage lien on railroad property to any one of them.

The lien of the State reserved in the fourth section of the act to herself, has all the time been invested in the State, has not been alienated nor assigned, but has been guarded against any competing or conflicting lien or mortgage. None could interfere with her supremacy, and that, too, has been carefully reserved for use when a necessity shall arise, and presupposes an estate and interest vested in the State as the basis for legislation. The immediate parties to the statutes are the State, with sovereign powers of legislation over persons and things within the State, and about thirty railway corporations. The conventions and duties in the statutes to complete

railroads; to manage and operate them; to pay instalments of interest and instalments of sinking funds; the principal of the debt; with powers to make new laws, to meet the varying contingencies to happen before bonds fall due, and the investiture of the State with a paramount and exclusive lien, with a dominion of these corporations for the protection of the interest of the State, and to secure her from all loss because of her issues of bonds of the State to all of them in large sums, which would be jeoparded without vigilance, sagacity, and authority, must satisfy us that the State could not have designed to divide or to disperse her estate in these properties, or to embarrass her system by the introduction of independent parties not subject to her rule, and who might greatly embarrass her government. The necessity for concentration of authority, for unity of control and management to secure the State from loss or damage, as well as to establish a system as proposed, made it needful for her to have a proprietary control without any interference from the creditors of the State.

The obligation of the State to pay her bonds and to maintain the pledge of the public faith, was indivisible. It pervaded all of the bonds which Tennessee had placed on the market. In one of the briefs it is stated that all of the bonds were printed on the same plate, and that one is not distinguishable from another, except by the numbers.

The instalments of interest became payable the same days of each year. Whenever the State has suspended payment of interest the whole instalment was suspended. The interest paid in the corporations formed a general fund. The charges against the different corporations are alike. They are borrowers under the same conditions, and the bondholders purchased bonds of Tennessee. These engagements of the various corporations are engagements prescribed by the State for loans of her faith and credit, which she has pledged in the same manner, and alterable and have been altered as we have shown.

No corporation is chargeable for a greater sum than she has received, and upon a return of the loan in the same quantity and

quality of State credit, or as the statutes of the State say, in bonds of a like character, is all that a State can reasonably exact in a settlement in the conditions in which she has been placed. The unity desired, and which is signified in the title of the act of 1852, in the body of uniform regulations for administrative control, in the demand for an unclouded title and the reprobation of all adverse or conflicting liens, the investiture of the State with an estate in all of the corporate stock and corporate property, and the reservation of full powers of legislation, show the distinct, comprehensive and vigorous character of this legislation and the purpose which dominates it, to maintain that the contracts of the corporations with her shall always be subject to her own legislation.

IX.

The plaintiffs in this case, upon presenting it to the Court, tell this Court "that it might be sufficiently presented by a mere transcript of the statutes," and on our part we may answer the entire case by a simple statement of what has occurred. The State of Tennessee, in the exercise of her powers of legislation, established a system of internal improvements in the State by the loan of the bonds of the State railway corporations. All of the bonds are alike, and each of the corporations received the same proportion of bonds according to the length of their railroads. The accountability of the corporations was confined to the executive power of the State under the State legislature. Between the State and the corporations the judicial department did not interfere, save in exceptional and special cases, in which the State was the plaintiff. Ordinarily, there was no citation, nor pleas, exceptions, juries. An administrative officer decided and enforced his decision in a summary way. There was no conformity to rules, and no reasons for judgment, and no judgment having a judicial quality. This Court notes the difference which has always existed in cases wherein public debtors are parties. "For though due process of law generally includes actor, *reus*, *judex*, regular allega-

tions, opportunity to answer and a trial according to some course of judicial proceeding, yet this was not universally true." The instance of public debtors is an exception. "Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, sometimes by systems of fines and penalties, but always in some way observed and yielded to."

Murray vs. Hoboken Land Company, 18 How., 270; Livingston vs. Moore, 7, p. 552; Lothrop vs. Stedmon, 42 Conn., 582; United States vs. Railroad Co., 98 U. S., 569; Sinking Fund Cases, 99 U. S., 700.

The State deputed to her Comptroller to state the debt of the corporations upon the books of his office. In the legislation of the State this lien originated upon the corporation property simultaneously with the delivery of the bonds into the possession of the corporation, and that all other liens, of whatever character, were null and void in any conflict or opposition to this one. There is a *pact de non aliendo* imposed on the corporation for its conservation. The decision of the legislature that this lien was a valid, subsisting and immanent lien and not transferred from her authority is conclusive of the question.

X.

The act of 1852 had for its purpose the arrangement of a number of railroad corporations to construct such railroads in the State of Tennessee, as would furnish all the demand for internal intercourse throughout the State. The word employed in the title of the act and the provisions of the act imply permanence, organization, control by the State—the establishment of a system in connection with domestic corporations. In so far as the corporations are concerned the essential element is the loan of State bonds of a negotiable quality and a subject for sale in the market, without the name of the corporation appearing in the transaction in any

form or manner. The bonds are near akin to simple bills of credit. The corporation contracts no debt nor duty to the holder. The holder is and has been a stranger. The holder appears in this Court to assert that the State, in making a loan to this corporation, established relations between the State and the corporation. The answer is, certainly. The relation is that of a borrower of the bonds of the State, with an obligation superinduced to return them, or bonds of a like character and amount, or in case of inability to do this to pay the value. But also the State imposed specific duties similar to such as would have been implied, and being a State, with ample powers to enforce duties thus imposed, described them in the act. The general aim of the act as well as the specific details of the performance, to be made by the corporation under its conditions, is that the State of Tennessee shall suffer no damage; and more than that, shall not be incommoded by any want of punctuality or exactness in doing all the State shall require. To enable her to enforce this upon the corporations she does not leave the corporation with a franchise, nor a property, even a spike, which is not invested in her, to the exclusion of every existing claim or any that shall be set up. The aim is to save the State from the payment of her bonds. All of her requirements have this intent. The general import of the word payment is liberation, and the contract of the corporation with the State was that the corporation should perform in her favor whatever the State should require to accomplish her own liberation from her contract with the State. A mode of payment under the sinking fund enactments would have liberated the corporation. So would the corporation have been liberated by the delivery to the State of the bonds she had received from the State, or any bonds of a like character and of the same amount. In this case it would have fulfilled the conditions. *Præstatio ejus quod in obligatione est.* The obligation of the company in that case would have been paid. The consent of the State to receive them at a different time and place would have been requisite. The terms the State had

imposed was that the corporation should deposit interest in her treasury and pay into her treasury a sinking fund, and with all of her power to make laws, the corporations were subject to perform the commands of the legislature as to the time and place to make their payments. Now the holder of the bond comes to affirm all of the contracts with the State by the corporation, are for the holders of the bonds, they enure to these plaintiffs. The State of Tennessee is a stakeholder, a surety, a trustee, a party without interest. We have quoted from Pollock rules on the subject of such claims and might rest there perhaps. But I propose to examine the qualifications or relaxations of the rule.

In a well considered case in Massachusetts, in which the rule is discussed at large, we find:

"That a person who is not a party to a simple contract cannot sue on that contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration will not sustain an action on it."

Exchange Bank vs. Rice, 107 Mass., p. 37.
Mellen vs. Whipple, 1 Gray, 317.
Locke vs. Horner, 131 Mass., 393.

The lien contained in the fourth section of act of 1852, was invested in the State of Tennessee, in June, 1861, upon the completion of the railroad in Tennessee. The duties of the corporation were defined by law, and by usage under the law, and by distinct entries of charge on the Treasury books.

There is no stipulation in the engagement of the corporation to pay any person save the State only. Nor does the fourth section of the act embody a promise that the corporation shall satisfy any holder of the bonds, the obligation or the engagement he makes to the State as a borrower. Nor does the State in the most remote manner declare that the railway corporation shall be a debtor to some future holder. As the act then stood the only parties to the contract are the borrower and lender of the State bonds.

In Garnsey vs. Rogers, 47 N. Y. R., 233, there is a delineation of the principle in harmony with the Massachusetts cases referred to above. The opinion of the Judge (Rapalho) states the case of Lawrence vs. Fox, has not gone so far as to hold that every promise made to another from the performance of which a third person would derive a benefit gives a right of action to such third person, he being neither privy to the contract or the consideration. *To entitle him to an action the contract must have been for his benefit.* And all that the case of Lawrence vs. Fox decides is, that whenever one person loans money to another upon his promise to pay another person to whom the party lending is indebted, the contract thus made by the lender is made for the creditor, and the latter may bring an action upon it without proving an express promise to himself. If such a promise could be enforced by the creditor who would be incidentally *benefited* by its performance, every agreement by which one party should agree with another for a consideration moving from him to become security for another to his creditors, or to advance money to pay his creditors could be enforced by the parties.

In Vrooman vs. Turner, 69 N. Y. R., 280, the rules above stated and the case is cited and sanctioned. Judge Allen says: "To give a third party, who may derive a benefit from the performance of a promise, an action, there must be first an intent by the *promissee* to secure some benefit to the third party, and second some privity between the promisee and the person to be benefitted, and some obligation or duty arising from the former to the latter which would give him a legal or equitable claim to the benefit of the promise. It is true there need be no privity between the promisor, and the party claiming the benefit of the undertaking. Neither is it necessary that the latter should be privy to the consideration of the promise; but it does not follow that a mere volunteer can avail himself of it." The promisor whose agreement is involved, is the Mobile & Ohio Railroad Company. It agrees to complete a public work in the State of Tennessee within the

State and upon a loan by the State of her negotiable bonds, that it will supply to the State the sums of interest and principal as she may require and to prepare a sinking fund, and the State may by laws make such other requirements as may save the State from loss by reason of the loan of such bonds, and that the State shall have a lien for the payment of the bonds, principal and interest. The bonds are suitable for sale in the market and were sold without any reservation of claim or cession of lien, or demand of security by any holder. The bonds pass by delivery and were so sold.

The case of Vrooman vs. Turner above cited was that a vendor A, selling his land and reserving a mortgage from his vendee, B. There are sales from B to C and C to E. E sells to F and in the contract, F reserves a portion of the price agreed to be paid to E with an agreement to pay off the incumbrance created by B at the first sale. The land was sold under a foreclosure and did not pay the mortgage debt of B. The Court decided that A could not sue F for that remainder, on that reservation or covenant.

The authorities in Great Britain are to the same effect.

Eley vs. Posetine G. Co., 1 Exch. D., 88.
New Zealand vs. Watson, 7 Q. B., 374.
Tweedle vs. Atkinson, 1 B. & S., 393.

The same question arose in the Roman law and in the codes which are derived from that law. There have been two contradictory and extreme theories successively maintained where one stipulates for a benefit or advantage to a third person, not a party thereto. One of these is, that no action could arise in favor of a third person in a convention to which he was a stranger. The Roman law allowed the stipulator, the action *condictio ob causam dati causa non secuta* in case of the debtor to perform to the third person the duty he had agreed to perform. This theory was held by Pothier, as cited p. 38. The opposite extreme is, to allow the stranger to maintain a suit without notifying the acceptance of the stipulation in his favor.

The modern law requires the stranger, before he can acquire the benefit or advantage proposed, to accept the stipulation before any right of action is acquired, and that the parties may revoke the stipulation at any time before acceptance; for a right cannot be irrevocably acquired which vests in such a form, without the assent of the person who is to profit from it. The Napoleon and Louisiana codes adopt this last view.

24 Demolombe, sec. 248, p. 234. C. N., 1120; Code La., 1890; 4 Aubry & Rau., p. 310.

Demante explains the benefit of the stipulation is not acquired by the third person until he manifests an intention to avail himself of it. A revocation may destroy the right in its germ. In general, the revocation may be made by him who has introduced it, because generally it is one of the parties, who desire particularly to benefit the third person; but if both were united in making the same disposition, both should concur.

5 Demante, Cours de Code Civil, p. 43.

This ability of the parties to revoke such an agreement is declared with some emphasis in a late Chancery case, by Jessell, Justice.

In re Eng. Co., 16 Ch. D., 125.

L. R., 2 Ch. Ap. 77, p. 88.

The performance of the contract of the Mobile & Ohio Railroad Company took place in 1872, with the full consent of that corporation and of Tennessee, by the intervention of Duncan, Iselin and Wilson. The bonds of Tennessee, in all particulars like those received, were returned to the State, with coupons of interest corresponding to those the State should have paid at maturity upon all of her issues. These plaintiffs probably concurred with the most conspicuous one of their number we have quoted, that the event was favorable to their interest and promoted their interest.

XI.

The plaintiffs produce to the Court in support of an averment that this defendant is *their* debtor, a number of coupons attached to bonds of the State of Tennessee being of the issue made to this corporation in 1856–61. In form it is a draft of the Comptroller upon the Treasurer of Tennessee to pay thirty dollars to the *bearer*, as the semi-annual interest on bond No. —, which has fallen due. The interest was payable in New York. The connection of the defendant is, that the bonds were those issued to the defendant by Tennessee in 1856–61, and were sold and the contract of construction was completed in 1861. Upon the completion of this work of construction and the delivery of the last instalment of 172 bonds on the 11th of June, 1861, the State had fulfilled her agreement under the internal improvement acts, and, at this time, the State of Tennessee was invested with the general, exclusive, and perfect lien or mortgage, which the last paragraph of section four describes. It is *the* lien of *the* STATE. At this period, too, we are to examine for the obligation which the railroad company was to perform, and to whom we have seen that shortly before any bonds were delivered to the company, an act had been passed to increase the amount of the annual sinking fund to two per cent. to commence five years from the date of the bond, and in 1860, an additional one-half per cent. was required. The act passed the 20th March, 1860, chapter 93, to provide for the equalization and investment of the sinking fund on the bonds issued to, or endorsed for the railroad in this State, was also in force. In this act the Comptroller's accounts, and the Treasurer's statements and the mode of payment of the debt by the corporations through the sinking fund are defined. The charge against the company is for the amount of the bonds originally issued to the corporation; and the mode of payment was either cash or in like character of bonds that may have been issued to the company. This was to be a full discharge of the corporation and a receipt to the corporation, for such payment was to be recorded and a duplicate given to the corporation. Secs. 5, 6, 7, 8, 9.

The essence of the agreement on the part of the State with the corporation was, that the corporation might sell the bonds received from the State, without endorsement, guarantee or contract of duty to the purchaser. The bonds are framed so that the State and any bearer, should be the only parties. When the bonds are sold the corporation has obtained the benefit he contemplated. He has money to construct the railroad. The next enquiry is what duty of restitution of the bonds or of other thing devolves upon the borrower?

The borrower was bound to restore bonds of the same quantity and quality at the time and place appointed, as he had received. The Tennessee statute is "of a like character." Upon a failure to do so he becomes a debtor for the value of the things borrowed, having reference to the time fixed for the delivery. The regulations contained in the laws of the State do not determine any date at which the return of bonds, should be made or could be made by the corporations. The act of 1852 provided for the deposit of instalments of interest semi-annually, in advance of the maturity of the coupons; and at the same time indicated a date for the commencement of the payment of a sinking fund. But this legislation was deferred, and the twelfth section of the act is a notification that the subject was open to further legislation. The statutes of 1856, 1860 and 1867 are explanatory upon the subject. The acts of 1869 and 1870 have a legal foundation in the relations which were established in the several acts passed by the Legislature. The position of the State was commanding and a large discretion was reserved and employed, but the bounds of these relations have not been exceeded.

XII.

In January, 1872, the indebtment of the Mobile & Ohio Railroad Company to the State of Tennessee for the loan of 1,296 bonds of that State, and for about five years of the coupons for semi-annual interest thereon unpaid, was finally adjusted with the consent of the State as expressed in enactments of the legislature

of the State in 1869–70. And with the consent of the corporation in writing filed with the Treasurer of the State. We have seen that on the books of the Treasury of the State kept by the Comptroller there was a charge against the corporation for a loan of bonds. In the reports made to the legislature and in the financial statements as well as in legislative acts, the bonds are designated as loans, and the corporations are spoken of and addressed as debtors, and as having an indebtedness due to the State. The settlement in 1872 was made by a novation in which Duncan, Iselin and Wilson were intervenors and became subrogated to the lien of the State. In respect to the State of Tennessee this was a payment. The accomplishment to her of the obligation of the corporation. Nothing more is demandable by her, her claim is satisfied. By the terms of the novation all of the accessory obligations as liens, powers and rights in property were subrogated and Tennessee was divested. The plaintiffs say all of this was a simulacrum, a speciosity, a sham, a nullity.

The whole of the case of the plaintiffs is dependent upon the determination of this fact. We read their coupons of interest and do not find there a debt due by this defendant existing therein. We have no proof that a demand of payment was ever made upon the defendant; nor any charge on the books of the creditors.

We do read of a demand by Tennessee for interest; we read of strict statutes and biting laws of Tennessee to compel payments to the State as a creditor. There are laws for seizure and sale. Laws to allow her to occupy and manage the railroad, to compel payment of interest in arrear and to pay off the debt by annual payments called sinking funds. We have then the fact that this debt of the Mobile & Ohio Railroad Company had been extinguished by this novation, seven years before this shrewd body of bondholders had thought of seeking for what they now for the first time assert. The settlement as made in 1872 does not vary in principle from that which is set out in the act of 1860, in relation to a rapid payment prior to the maturity of a bond of the State debt through a semi-annual collection from the corporations.

The return of the bonds loaned, in bonds of the same quantity and quality is the essential enactment in that act. No opposition was then made and the act as made is evidence of the original intent of the parties, and a just exposition of legal right. No objection would be made now to this exposition, but for unforeseen and complex questions which have arisen incidently or accidentally, because of the overturn of the system which the State sought to establish, and which the contract had not fully provided for, before they had arisen. But these questions are, as we have shown, within the sphere of the relations which the State, and the corporations, as borrower and lender, established in the first years of their connection; are well expressed in the act of the 20 March, 1860; and are declared in the acts of 1869 and 1870. And are maintained in the settlements which took place, and in the judicial decisions since made in the State of Tennessee. The broad reservations of the 12th section which enabled her to shape her policy in this direction. These enactments of the General Assembly do not import contracts, nor vest rights, and are revocable in their nature and operation, varying as conditions and circumstances operate. The State kept firmly under own control all of the machinery she put in operation. The only creditor of the corporations is the State. The only debtor to the holders of her bonds is the State. A settlement between the State and the corporations under the acts of 1869 is final and liberates the corporation from the debt and all the accessories. The obligation of the corporation to the State for the loan of her bonds is the principal obligation, and when that was extinguished the liens, charges and other accessories were extinguished, or were subrogated.

XIII.

The observations of this Court in Chamberlaine vs. Sioux City, 92 U. S., p. 306, have thrown light upon this discussion and has guided it. The Court say: "The deed and mortgage to the State were not intended to create a trust in favor of her own bonds.

The State was *prima facie* liable to the bondholders, and it was only as between her and the company that the relation of principal and surety existed. The endorsement by the President of the company only transferred the bonds; it was not the act of the company. Whatever right the plaintiff had to compel the application of the lands received by the State to the bonds held by them, was resting in equity merely. It was not a legal right arising out of positive law, or an agreement of the parties. It did not create any lien which attached to and followed the property."

The terms of the mortgage were, that each company (receiving bonds) shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to the said company, and for the punctual payment of the interest which shall accrue thereon, in such a manner as to exonerate the treasury of the State from any advances of money for that purpose. In the case before the Court the bonds contained no reference to the corporation, but were payable to the bearer. The acts of the General Assembly prescribed a precise mode of collection of the interest, and of the principal, and of a sinking fund, and the remedial processes for the defaults and for payments in all cases by the State directly. No payment was ever expected of the corporation. The case of Murdock vs. Woodson, 2 Dillon, C. C. R. 206, which seems to be a parallel to this; there was a statutory lien to secure an issue of bonds. The lien covered the railroad, its net tolls and income; there was a provision to punctually pay the bonds, principal and interest, and the State might sell the railroad to others or buy it. The Court denied the existence of a trust, and admitted that the State could relinquish the lien.

Branch vs. Macon & B. R. Co., 2 Woods, C. C., p. 388.
Wilson vs. Boyce, 2 Otto, 224.
Woodson vs. Murdock, 22 Wall., 351.
Murdock vs. Woodson, 2 Dillon, 188.

The lien of the State of Tennessee, as invested by the statute without a deed from the company for the purpose of obtaining a

full indemnity from all loss because of the issue of her bonds under the act, and the mode of defending herself, are elaborately stated, and the power to do so fully asserted, and her remedies are described in the acts.

XIV.

The relations established in these statutes are all legal relations. They are imposed by law, essentially revocable in their nature, and to be altered or modified as an occasion may require. That a person may acquire rights or be subject to obligations as the effect of a contract, the least that should be asked for is there should be a consent or purpose manifested. Conventions have effect only between the contracting parties and upon a sound principle; they do not injure or profit any third person.

The parties to these improvement statutes are the State of Tennessee, dealing with the subject matter as a legislature imposing rules of action, and the corporations are subjects owing obedience to those laws by fulfilling in advance conditions precedent. The duty imposed by the law is direct and is the precise consequence of an assent to the law as made. There is no *equitable estate*, right, title, interest or property *invested in the State*, or other person separate from the legal estate. There is no use for a Court of Chancery to decide upon matters of conscience. The State has set down in the statute what she will enact as laws under some circumstances, and what provision she will make in the future in respect to the corporation.

Story's Eq., Sec. 964; 2 Atk., 612.

The State holds no position as trustee; she has no *cestui que trustents.* The corporation has accepted a loan of 1,296 of her bonds, sealed with her seal, and suitable for sale. She invests herself with a supreme lien, a legal estate, and right which she will hold until she is liberated from the obligation contracted by her in the issuing of those bonds and their delivery to this corporation. There is no debt nor duty imposed upon any person but

the corporation; the State comes under no obligation to any other by the investiture which has taken place. The precise purpose of the fourth section of the act of 1852 was to settle the relations between these parties. Nothing was before them but the immediate relation to be established at the delivery of the bonds and at the time the work had been completed by the railroad company. It will appear from these facts, from a consideration of the different sections in the statutes, and the usage under the statutes, and the character of the laws subsequently made, that the State of Tennessee had no thought of offering further assurance to the purchasers of her bonds; or of placing them in any connection or contract with the railway companies, or of transmitting to them an interest in the railway property. Her purpose was to obtain an estate adequate to enable the legislature to legislate with vigor when it might be necessary for the public good. The relation of trustee and *cestui que trust* does not exist. In the Louisiana cases in this Court there was a similar attempt to evade the relations determined by constitution and laws, by doubtful interpretations and oppositions of science so called.

In those cases there were facts that taxes had been pledged in express words; some had been collected and were apart from other moneys; some were in process of collection; there was a corporation which might assess, collect and distribute the taxes for the future. We have nothing to do, it was said, but to write the decree. But a sober-minded, sincere, magnanimous obedience to the constitution as the supreme law does not admit any indulgence of the oppositions of science, falsely so called. The decree could not be written; the only debtor the plaintiffs have is the State of Tennessee. The only contract the plaintiffs made was to acquire as their property her bonds. The defendants are not debtors.

XV.

The obligation of that State in this Court is an imperfect obligation, for the reason that the constitution prohibits a suit to

enforce it. The lien of the State of Tennessee is a real right, an estate, an authority obtained by her own declaration, without a deed from the corporation, and invested in her. It is possessory, for the State may take possession under her estate and because of her laws. The same objection arises in reference to seizure of the property as existed in the Louisiana suits. Pollock in his chapter upon imperfect obligations makes a summary of the law.

An imperfect obligation is an existing obligation which is not directly enforceable. This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent. When an agreement of imperfect obligation is executory, a right of possession, founded on the obligation, can be no more enforced than the obligation itself.

Pollock on Cont., p. 600, Am. ed.

This right of possession to the property of the Mobile & Ohio Railroad Company was invested in the State of Tennessee by the lien she retained, and the executory process she reserved in her statutes commencing in 1852, and which are implied in the statutes regulating the sales for default for two years in the payment of interest and default in the payment of the sinking fund. No transfer of this lien was made by the State, and there is no means by which the plaintiff can withdraw it by judiciary action. The State is not the subject of the judicial power.

Louisiana vs. Jumel.
Elliottt vs. Wiltz, 107 U. S., 711.
Troy vs. Commonwealth, 127 Mass., 43.
Connecticut vs. Shelton, 47 Conn., 400.
Sloman vs. Governor, 1 C. P. D., 562.
Parlement Belge, 5 Prob. D., 605.
State vs. Burke, 33 Ann., 498.

XVI.

The jurisdiction of this Court in these cases is invoked upon some impression that there exists some *equity* which binds the conscience of the State of Tennessee, and that the Court can be called upon to direct and guide that conscience to the adoption of their prayer to substitute the holders of these bonds to the rights and faculties of the State in her various acts of legislation. The constitution of the United States has opposed a barrier to all enterprises of good and benevolent Courts or judges to amplify jurisdiction. The disclaimer is of the existence of judicial power in the United States, and a direction that it shall not be employed. In Casbird v. Attorney General, the Ch. Baron Richards says "very considerable difficulty has occurred in the consideration of cases between the subject and the crown, from a doctrine which is well founded to a certain extent, *that there are no equities against the crown.* I felt early in this cause the embarrassment which arose from the doctrine that the crown cannot be *considered* a trustee. I say generally, for I do not mean to say that it is so universally, and I do not know if the crown had the legal estate, how I could have got it out of the crown's hands for the benefit of the *cestui que trust.*"

6 Price Ex. R. 411, 480.

When the crown is a trustee, the Court of Chancery has no jurisdiction to decree a conveyance, but the party must resort to a petition of right; and the court can decree no foreclosure against the crown, nor sale of a legal title when the title is in the crown.

3 Y. & C. Ex. 342. 2 Vesey Sr. 446.

Troy vs. Commonwealth, 127 Mass., 43.

1 Perry on Trusts, pp. 40, 41.

XVI.

The State of Tennessee in undertaking to establish a system of internal improvements, by granting to corporations, loans of the

bonds of the State bearing interest, and becoming payable at a remote period of time, thus to secure the State, became invested with a lien or mortgage upon the entire property of all of the corporations for the repayment to her of the sums lent. The bonds were sold by the corporations, and not by the State and were payable to no ascertained person, "to bearer." The State did not assign the lien; nor did the corporation guarantee the payment of the bond. The corporations were all domestic, their property within the State, and for every duty exacted of them, performance was required to be made for the State and within the State.

The question is whether upon a failure of the State to pay the interest on the bonds, this Court can decree the payment of this debt, due to the holders of the bonds, should be made by the Mobile & Ohio Railroad Company, as the borrower of bonds?

Lord Chancellor Selbourne has said in a late case, "It is equally important to maintain the doctrine of trusts which is established in a Court of Chancery, and not to strain it by unreasonable construction beyond its proper limit. There would be no better mode of undermining it than to make unreasonable and inequitable applications of it."

Barnes vs. Addy, 9 Ch. App., 281.
Wilson vs. Bury, 5 G. B. D., 518.

Another Master of Equity has said: "There is one good, general and infallible rule as never deceives. A general rule to which there is no exception; and the rule is that the law never implies, and the Court never presumes a trust, but in a case of absolute necessity."

Cook vs. Fontaine, 3 Swanst., 533.
Citizens Bank vs. National Bank, L. R., 6 H. L., 352.

The Court is invited to give, create, convey, imply, or presume a trust in favor of these plaintiffs. The Court may find it, if it pleases, in the bonds, although the bonds are entirely free from any allusion to one, or any declaration of one. The bonds are not

the bonds of the Mobile & Ohio Railroad Company. The bonds are the bonds of the State, and the State has invested herself with a lien to secure from the railroad company the fulfilment of her obligations to the State; the ultimate result to be the performance by the corporation to the State, of all of her obligations and duties as a borrower of bonds, so that the State should not suffer loss or even inconvenience. Savigny, speaking of this class of issues—bonds of a State—"They are true *quantities;* things which have no individual value. One obligation of a State has absolutely the same value as another of the same kind and amount. They may be placed absolutely in the same rank as money in this point of view, which are distinguishable, however, in their destination. Their end consists in bringing together large sums of money, as they afford to investors an easy and convenient mode of placing their money at interest."

2 Savigny des Ob., sec. 64, p. 268–9.

The obligation of a borrower of bonds is to make payment of his loan in any of these quantities. This obligation may be discharged at the pleasure of the borrower and lender. The lender can never be damaged by a return of the bonds. The State, after the railroad was completed, would have been relieved by such a return. The construction which the plaintiff contends for would obstruct the policy of the State to liberate herself from debt and to withdraw her bonds from the market.

The aim of the State of Tennessee was to redeem all of the bonds of the State before their maturity. The provision for a sinking fund in the first act of 1852, and the more definite expression in the act of 1856, still more strongly expressed in 1860 and in other acts after the war, leave no doubt of her policy. The preservation of her lien until this was accomplished is found in all of her acts, so that none of these intimate that the holders of her bonds should have any legal right or any authority to enforce that lien. The lien was for the State, through which all of her measures should be validated and made effectual. The exclusiveness of the lien and

of the power of the Legislature to enact laws necessary, were the reliance of the State. The terms of the act remind us of the prerogative rights and remedies which are described in the ancient statutes of England, and are commented on in the digests of her laws. The King shall be preferred before any other creditor. By the common law, the King's debtor had protection, so that he should not be sued by other creditors until the debt of the King should be paid. Every person who is anywise chargeable to the King is a debtor to the King, whether it be for debt, duty, damage, or rent in arrear, or other thing, for it shall be taken extensive.

Comyn's Digest, tit. Dett., G., 1, 8.

Giles vs. Grovey, 6 Bligh, N. S., 398–399.

The twelfth section of the act of 1852 is so comprehensive in its terms, and has been so consistently applied in the administration of the State without contention or dispute, that were there more of discrepancy in the statutes than there appears to be, there can be no ground for the impeachment of the settlement by the Mobile & Ohio Railroad Company with the State in 1872. The State at that date received her principal and her interest, in full, in her own bonds upon her own proposition, that payment should be so made.

She was liberated from all the debt she had contracted for the account of the defendants.

JOHN A. CAMPBELL,
For Appellee.